(16,303.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 180.

JULIUS A. BELEY, F. DARLING, AND CHARLES DRIGARD, PLAINTIFFS IN ERROR,

vs.

JOSEPH NAPHTALY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1897.

1 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY, FREDERICK DARLING, RICHARD DOE, JOHN ROE, Richard Roe, John White, Richard White, John Black, Richard Black, John Brown, Richard Brown, John Green, Richard Green, George Green, Charles Green, George Black, Jane Doe, Jane Roe, Jane Black, Jane White, Jane Brown, Defendants.

Amended Complaint.

The said plaintiff, Joseph Naphtaly, of the city and county of San Francisco, State of California, and a citizen of said State, for his amended complaint herein, complains of said defendants, and for cause of action alleges:

I.

That heretofore, to wit, on the 1st day of October, 1893, the said plaintiff was, and ever since has been, and now is, the owner in fee and entitled to the possession of all those certain tracts of land situated in the county of Contra Costa, State of California, and
2 particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, and which was filed in the land office of the United States for the San Francisco district, on Nov. 3d, 1893, as lots Nos. three (3), six (6), seven (7), eight (8), nine (9), and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter, and the northeast quarter of section ten (10), lot one (1) and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5), and six; the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three (3); the west half of section eleven (11), township one (1), south range two (2) west, Mount Diablo base and meridian.

II.

That afterwards and while the plaintiff was the owner in fee and entitled to the possession of said tract of land as aforesaid, said defendants wrongfully entered upon the same and ousted and ejected the plaintiff therefrom, and from the whole thereof; and *and* from thence to the present time, have wrongfully withheld the possession thereof from the plaintiff, to his damage in the sum of one thousand dollars.

III.

That the value of the said tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, ex-

clusive of interest and costs, exceeds the sum of two thousand dollars.

3 IV.

That the title of plaintiff to all of said tract of land, and his right to the possession thereof, accrued to and vested in him under and by virtue of patents therefor, which were duly and regularly issued to him by the United States in the year 1893, under and in pursuance of the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, and the provisions of section 7 of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California;" that the defendants and each of them deny the validity of said patents, and each of them; they and each of them allege that the plaintiff purchased the said lands and premises in the said patents mentioned and described, from the assignee of the grantees of an alleged Mexican grant, after the final rejection of the said alleged grant by the Supreme Court of the United States, and with full knowledge of the same; they and each of them allege, that the plaintiff purchased the said lands and premises from a person who obtained the same from an assignee of the grantees of an alleged Mixican grant by deed of gift; they and each of them allege that the plaintiff claims to have purchased the said lands and premises from the assignee of persons who claimed to have a final and complete grant from the then Mexican governor of the State of California, but the said defendants and each of them allege that no such grant was ever issued to the said alleged grantees; therefore, for and on account of the matters and things

4 aforesaid, they and each of them deny that the plaintiff is or was a purchaser in good faith and for a valuable consideration, of the said lands or any part thereof, within the true intent, construction, and meaning of the said section 7 of the act of Congress of July 23, 1866; they and each of them deny that the plaintiff purchased the said lands from Mexican grantees, or their assigns; they, and each of them, deny that the said lands so purchased by the plaintiff and conveyed to him by the United States by said patents, ever were part or parcel of any Mexican grant, genuine, or supposed to be genuine; they, and each of them, deny that the plaintiff or his predecessors, or grantors, ever used or improved or continued in the possession of the said lands or any part thereof, according to the lines of his or their alleged original purchase of the said lands, described and conveyed in and by the said patents to the plaintiff; they, and each of them, deny that no valid right or title adverse to the plaintiff existed at and prior to the settlement and purchase of the said lands and premises, and the proceedings terminating in the issuance of said patents, but, on the contrary, they, and each of them, allege and aver that they and their ancestors, predecessors and grantors, had a valid adverse right and title to the said lands and premises, conveyed by said patents so issued to the plaintiff; they, and each — them, deny that under the statutes, or any statute, the officers of the United States had any

right or power to issue the said patents, or either of them, to the plaintiff; they, and each of them, deny that said patents, or either of them, conveyed or conveys unto the plaintiff, any estate, right, title or interest in or to said lands, or any part thereof.

V*I*.

That the value of the rents, issues and profits of said tract of land is the sum of two thousand dollars per annum.

VI.

That the true names of said defendants sued herein by the names of John Doe, Richard Doe, John Roe, Richard Roe, John White, Richard White, John Black, Richard Black, John Brown, Richard Brown, John Green, Richard Green, George Green, Charles Green, George Black, Jane Doe, Jane Roe, Jane Black, Jane White and Jane Brown are unknown to plaintiff, and he therefore prays that when their true names are discovered, they be inserted herein and in all subsequent pleadings, papers and records in this action, in the place of said fictitious names.

Wherefore, said plaintiff prays for judgment against said defendants for the possession of all of said tract of land, and for the sum of one thousand dollars ($1,000) damages as aforesaid, and for the sum of two thousand dollars ($2,000) for the value of the rents, issues and profits of said lands as aforesaid, and for costs of suit.

NAPHTALY, FREIDENRICH & ACKERMAN,
Attorneys for Plaintiff.

CRITTENDEN THORNTON, Esq., *Of Counsel.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Joseph Naphtaly, being duly sworn, deposes and says, that he is the plaintiff in said action; that he has heard read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he verily believes it to be true.

J. NAPHTALY.

Subscribed and sworn to before me, this 15th day of June, 1894.
[SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Service of a copy of the within answer admitted this 15th day of June, 1894. Earl H. Webb, attorney for def't. Filed June 15, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

The following is endorsed on the foregoing amended complaint: The default of the within-named defendant, Richard Roe, whose true name is Chas. Brigard, entered upon minutes of court January 24, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

7 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, FREDERICK DARLING, Defendants.

Answer of Julius A. Beley to Amended Complaint.

Now comes the defendant, Julius A. Beley, and for answer to the amended complaint herein, answers for himself and says:

I.

That he denies that heretofore, to wit, on the 1st day of October, 1893, or at any other time, plaintiff was, or ever since has been, or now is, the owner in fee or otherwise, or entitled to the possession of those certain tracks of land situated in the county of Contra Costa, State of California, or particularly described on a plat of the survey made by the surveyor general of the United States, for the district of California, or any other United States surveyor for said State, filed in the land office of the United States for the San Francisco land district, on November 3rd, 1893, or at any other time, described as Nos. three (3), six (6), seven (7), eight (8), nine (9), and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of
8 the southeast quarter; the north half of the southeast quarter of section ten (10), lot one (1), and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5), or six (6), or the southeast quarter of the southwest quarter or the northeast quarter of the southeast quarter; or the south half of the southeast quarter of section three (3); or the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo meridian.

II.

Defendant denies that the plaintiff was or is the owner in fee, or otherwise, or that he is entitled to the possession of said tract of land, hereinbefore described, or any part thereof. Denies that he ever wrongfully entered upon the same, or ejected the plaintiff therefrom, or from any part or parcel thereof. Denies that he at any time wrongfully withheld the possession thereof from the plaintiff or any part of the same, to plaintiff's damage in the sum of one thousand dollars or in any other sum whatever.

III.

Defendant admits that the value of said described tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

IV.

That in answer to the fourth paragraph of said complaint, defendant denies that the title to all or any part of said de-
9 scribed land, or plaintiff's right to the possession thereof, vested in him under or by virtue of patents therefor, duly or regularly issued to said plaintiff by the United States in the year 1893, under or in pursuance of the provisions of the act of Congress of the 24th of April, 1820, entitled "an act making further provisions for the sale of public lands," or the acts supplemental thereto, or under the provisions of section seven of the act of Congress of July 23rd, 1866, entitled, "An act to quiet land titles in the State of California," or under the provisions of any other act of Congress providing for the issue of patents for said described tract of land, or any part thereof.

V.

That it does not appear from paragraph four of said complaint, or any part of said complaint, the statement of any fact or facts sufficient in law to show that this honorable court has any jurisdiction over said cause of action and does not state wherein or how said cause of action arises under the Constitution or laws of the United States.

VI.

That as to the allegation in said plaintiff's complaint, in paragraph four thereof, that the value of rents, issues, or profits of said tract of land *in* the sum of two thousand dollars per annum, defendant has no information or belief upon the subject sufficient to answer the allegation and upon that ground denies the same.

VII.

Defendant for a further answer to plaintiff's complaint
10 says: That he disclaims any right, title, or right of possession to any of said described land except that portion known and described as the northeast quarter of section ten (10), township one (1) south, range two (2) west, Mount Diablo base and meridian, containing 160 acres more or less.

Wherefore, defendant demands for judgment that said action be dismissed against the defendant, Julius A. Beley, and for costs of suit.

EARL H. WEBB,
Att'y for Def't Beley.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, } ss:

Julius A. Beley, being duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated

on his information and belief, and as to these matters he believes it to be true.

JULIUS A. BELEY.

Subscribed and sworn to before me this 20th day of June, 1894.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed :) Service by copy of the within admitted this 20th day of June, 1894. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed June 20th, 1894. W. J. Costigan, clerk.

11 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, FREDERICK DARLING, Defendants.

Answer of Frederick Darling to Amended Complaint.

Now comes the said Frederick Darling for himself and for answer to the plaintiff's amended complaint herein, says: That on the 3rd day of March, 1894, at the county of Contra Costa, in said State of California, he was personally served with a summons and a copy of the complaint herein and designated therein under a fictitious name.

I.

Defendant denies that heretofore, to wit, on the 1st day of October, 1893, or at any other time, plaintiff was or ever since has been, or now is, the owner in fee, or otherwise, or entitled to the possession of those certain tracts of land situated in the county of Contra Costa, State of California, *or* particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, or any other United States surveyor for said State, filed in the land office of the United States for the San Francisco land district, on November 3rd, 1893, or at any other time

12 described as Nos. three (3), six (6), seven (7), eight (8), nine (9) and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter of section ten (10), lot one (1), and the southwest quarter of the southwest quarter of section two (2); lots one (1), two (2), three (3), four (4), five (5) or six (6), or the southeast quarter of the southwest quarter, or the northeast quarter of the southeast quarter; or the south half of the southeast quarter of section three (3); or the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo meridian.

II.

Defendant denies that the plaintiff was or is the owner in fee or otherwise, or that he is entitled to the possession of said tract of land hereinbefore described, or any part thereof. Denies that he ever wrongfully entered upon the same, or ejected the plaintiff therefrom, or from any part or parcel thereof. Denies that he, at any time, wrongfully withheld the possession thereof from the plaintiff, or any part of the same to plaintiff's damage in the sum of one thousand dollars, or in any other sum whatever.

III.

Defendant admits that the value of said described tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

13 IV.

That in answer to the fourth paragraph of said complaint, defendant denies that the title to all, or any part, of said described land, or plaintiff's right to the possession thereof vested in him under or by virtue of patents therefor, duly or regularly issued to said plaintiff by the United States in the year 1893, under or in pursuance of the provision of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands or the acts supplemental thereto, or under the provisions of section 7 of the act of Congress of July 23d, 1866, entitled 'An act to quiet land titles in the State of California,'" or under the provisions of any other act of Congress providing for the issue of patents for said described tract of land, or any part thereof.

V.

That it does not appear from paragraph four of said complaint, or any part of said complaint, the statement of any fact or facts sufficient in law to show that this honorable court has any jurisdiction over said cause of action and does not state wherein or how said cause of action arises under the Constitution or laws of the United States.

VI.

That as to the allegation in said plaintiff's complaint in paragraph IV thereof, that the value of the rents, issues, or profits of said tract of land is the sum of two thousand dollars per annum defendant has no information or belief upon the subject sufficient to answer the allegation, and, upon that ground, denies the same.

14

VII.

Defendant for a further answer to plaintiff's complaint says: That he disclaims any right, title or right of possession to any of said described land except that portion known and described as lots one (1), two (2) and three (3), and the southwest quarter of section three

(3), Mound Diablo meridian, containing one hundred and sixty acres of land, or thereabouts.

Wherefore, defendant demands for judgment that said action be dismissed against the defendant, Frederick Darling, and for costs of suit.

PHILIP TEARE,
Attorney for Defendant Darling.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, } ss:

Frederick Darling being duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated on his information and belief; and as to those matters, he believes it to be true.

F. DARLING.

Subscribed and sworn to before me this 20th day of June, 1894.
W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

15 (Endorsed:) Service by copy of the within admitted this 20th day of June, 1894. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed June 20th, 1894. W. J. Costigan, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY and F. DARLING, Defendants. } No. 11900.

Judgment.

This cause having heretofore come on to be heard before the Honorable Joseph McKenna, judge of the above-entitled court, sitting without a jury, a jury having been waived by the stipulation of the parties in writing, made and filed in open court, A. L. Rhodes, Esq., and Crittenden Thornton, Esq., appearing for the plaintiff, and Philip Teare, Esq., and H. F. Crane, Esq, appearing for the defendants; and all and singular the evidence and testimony being seen, heard and duly considered, and the court having heretofore announced its decision in favor of the plaintiff—

And the parties hereto having, in writing, waived findings herein—

16 And it further appearing to the court that Charles Brigard, sued herein as Richard Roe, was duly served with summons and complaint herein, and that he has failed to appear within the

time required by law, and that his default for failure to plead herein has been duly entered:

It is now by the court ordered, adjudged and decreed, that the plaintiff herein do have and recover from Julius A. Beley, F. Darling and Charles Brigard, defendants herein, all those certain tracts of land situated in the county of Contra Costa, State of California, and particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, filed in the land office of the United States for the San Francisco district, on November 3d, 1893, as lots Nos. three (3), six (6), seven (7), eight (8), nine (9) and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter, and the northeast quarter of section ten (10), lot one (1) and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5) and six (6); the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three (3); the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo base and meridian.

That the plaintiff likewise have and recover of said defend-
17 ants his costs in this action, and that execution issue for the possession of said lands and premises, and the said costs, under the seal of this court.

Dated February 21st, 1895.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed and entered February 21st, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Notice of Motion for New Trial.

You will please take notice that on Friday, the 15th day of February, 1895, at 11 o'clock a. m. on that day, or on such day thereafter as said motion can be heard, the defendants will move said court to set aside the judgment made and rendered herein on the 23rd day of January, 1895, and grant a new trial in this cause.

That said motion will be based upon the following grounds, to wit:

That the court erred in sustaining the plaintiff's objection to the following evidence offered by the defendants for the purpose of showing the invalidity of the patents put in evidence by the plaintiff, to wit:

18 First. The application of the plaintiff to purchase the lands in question from the United States, filed August 10th, 1883, in the United States Land Office.

Second. Record of the Romero claim as it appears from the archives of the Mexican government on file in the office of the surveyor general in San Francisco.

Third. Decree and proceedings of board of land commissioners concerning said Romero claim, dated April 17th, 1855.

Fourth. Opinion and decree of United States district court in the matter of Romero claim, dated 5th day of October, 1857.

Fifth. Opinion and decree of Supreme Court of United States on said claim in December term, 1863.

Sixth. Decision of Hon. Wm. A. J. Sparks, Commissioner of General Land Office of the United States, dated March 2nd, 1887, rejecting the application of the plaintiff to purchase said land.

Seventh. Decision of Hon. W. F. Vilas, Secretary of the Interior of the United States, dated February 4th, 1889, affirming the decision of said Commissioner and denying the application of the plaintiff to purchase said land.

Eighth. Decision of Hon. Geo. Chandler, acting Secretary of the Interior, dated June 23rd, 1891, granting a review and rehearing of said application of plaintiff.

Ninth. Decision of Hon. John W. Noble, Secretary of the Interior, dated May 18th, 1892, allowing said application of plaintiff to purchase said land.

That said motion will be made upon a bill of exceptions
19 by the defendant- to be hereafter allowed and settled. And upon the pleadings and files in said cause.

Dated Jan'y 31st, 1895.

HENRY F. CRANE AND
PHILIP TEARE,
Att'ys for Def't.

(Endorsed:) Service of a copy of the within notice admitted this 31st day of Jan'y, 1895. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed Feb. 1st, 1895. W. J. Costigan, clerk, by W. B. Beaizley, dep. clerk.

At a stated term, to wit, the February term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 25th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOS. NAPHTALY
vs.
J. A. BELEY *et al.* } 11900.

Order Denying Motion for New Trial.

By consent of counsel, the motion for a new trial pending herein was submitted to the court without argument and ordered denied.

20 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants.

Bill of Exceptions.

Be it remembered that on the 27th day of June, 1894, the above cause came on regularly for trial before the court sitting without a jury, a jury having been waived by the parties hereto, whereupon the following proceedings were had, to wit:

The plaintiff to maintain the issues on his behalf introduced and put in evidence two certain patents purporting to have issued to him from the United States for the land described in the complaint, which patents are in the words and figures as follows, viz:

"THE UNITED STATES OF AMERICA.

"Certified No. 18964.

"To all to whom these presents shall come, Greeting:

"Whereas, Joseph Naphtaly, of San Francisco county, California, has deposited in the General Land Office of the United States, a certificate of the register of the land office at San Francisco, California, whereby it appears that full payment has been made
21 by the said Joseph Naphtaly according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provisions for the sale of the public lands' and the acts supplemental thereto for the lot numbered one and the southwest quarter of the southwest quarter of section two and the lots numbered one, two, three, four, five and six, the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three, in township one south, of range two west, of Mount Diablo meridian in California, containing three hundred and seventy-one acres and forty-hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Joseph Naphtaly.

Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Con-

gress, in such case made and provided, *have given and granted* and by these presents *do give and grant* unto the said Joseph Naphtaly, and to his heirs the said tract above described, *to have and to hold* the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Joseph Naphtaly and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a
22 vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the 28th day of February, in the year of our Lord, one thousand eight hundred and ninety-three, and the Independence of the United States, the one hundred and seventeenth.

(Seal of General Land Office United States.)

By the President:

BENJAMIN HARRISON,
By E. MACFARLAND,
Assistant Secretary.
D. P. ROBERTS,
Recorder of the General Land Office."

Recorded vol. 31 A, page 261.

The other patent is in form, terms and substance the same as the foregoing, except that the latter calls for other land, which is designated and described as follows, viz:

"Lot numbered six of section nine, and the lots numbered three, six, seven, eight, nine and twelve, the northeast quarter of the southwest quarter, the east half of the northwest quarter, the southeast quarter of the southeast quarter, the north half of the
23 southeast quarter, and the northeast quarter of section ten, in township one, south range two west, of Mount Diablo meridian, in California, containing five hundred and sixty-six acres and sixteen-hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general."

The plaintiff then proved that while he was in the peaceable and quiet possession of the lands described in the complaint, the defendants, Beley, Darling and others, entered upon the said lands and ousted plaintiff therefrom and have ever since detained said lands from the plaintiff, as alleged in the complaint herein.

The plaintiff also proved the rental value of said land.

It was then admitted by the defendants' counsel that at the time of the issuance of the patents hereinbefore described the lands therein, and in the complaint described, were public lands of the United States, subject to sale under the laws of the United States. It was here conceded by defendants' counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein, or any part thereof, either by certificate of purchase, patent, or anything of the kind.

The plaintiff then rested.

The defendants then offered in evidence the following documents:

First. The application of the plaintiff, Naphtaly, to purchase said land from the United States, which is in words and figures as follows, viz:

24 UNITED STATES LAND OFFICE,
San Francisco, California.

"To the register and receiver:

I, Joseph Naphtaly, a citizen of the United States of America, and a resident of the city and county of San Francisco, State of California, do hereby apply to purchase from the Government of the United States of America, under and in pursuance of section seven of an act of Congress entitled 'An act to quiet land titles in California,' approved July 23rd, 1866, the following pieces and parcels of land, to wit: Lots 4, 5, 6 and 7 (four, five, six and seven) of section —, T. 1 N., R. 2 W. Also all of fractional sections 2 and 3, lots 3, 4, 5, 6, 9, and the E. ½ of S. E. ¼ of sec. 4; the N. E. ¼ of N. E. ¼ of sec. 9; all of section ten; all of fractional section eleven: all of fractional section twelve; lots 1 and 2, and the W. ½ of S. W. ¼ of sec. 13; all of section 14; all of sec. 15; the N. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ of section 22; the N. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼ of section 23, in township 1 south, of range two west, Mount Diablo meridian, and I beg leave to refer to the diagram hereto annexed, marked Exhibit 'A,' which shows the said parcels of land as claimed and occupied by me and my grantors, and included within the red-inked fence line.

In support of my said application I do hereby allege that said land was included within the exterior boundaries and *formed part of a grant made by the Mexican government* in the year 1844 to the three brothers Romero, viz: Inocencia Romero, Jose Romero
25 and Mariano Romero; that said brothers Romero presented their claim for certain lands which included the lands hereinbefore particularly described to the board of U. S. land commissioners to ascertain and settle private land claims in the State of California, that said board rejected said claim, and on appeal to the Supreme Court of the United States said claim was finally rejected in the year 1863. That in the year 1846 or 1847 the Romero brothers made a division of the lands claimed by them under the

grant aforesaid, Inocencia Romero taking the lands embraced within the enclosure delineated on said diagram, and said Inocencia used and cultivated said lands until the 26th of December, 1853, when he, for a valuable consideration to him paid, sold and conveyed said land and the possession thereof to Domingo Jujol and Francisco Sanjurjo, who entered upon the possession of said land embraced within said enclosure and used, improved, and continued in the actual possession thereof as according to the lines of their original purchase until February 14th, 1855, when said Jujol, and Sanjurjo, for a valuable consideration, sold and conveyed said tract of land and transferred the possession thereof to one J. W. Tice, who entered upon the possession thereof, used, improved, and cultivated and continued in the actual possession thereof until August 8th, 1855, when he, for a valuable consideration, sold and conveyed said tract of land, and transferred the possession thereof to A. J. Tice, who then entered into the possession of said land and used, and cultivated, and improved, and continued in the possession thereof until October 17th, 1859, when he conveyed said tract of
26 land and transferred the possession thereof to one S. P. Millett. That said Millett then entered into the possession of said land, used, improved and cultivated the same and continued in the actual possession thereof according to the lines of the original purchase. That in 1868 he made a conveyance thereof to D. P. Smith, who made a conveyance thereof to one J. R. Spring in February, 1869, and who made a conveyance thereof to Martin Clark in March, 1869, who *in* May 15th, 1876, made a conveyance thereof to this applicant.

That said conveyance to said D. P. Smith was made as this applicant is informed and believes for the benefit of said S. P. Millett and the conveyances to Spring and Clark were made for the benefit of this applicant who entered in the exclusive possession of said land in September, 1873, and has used, improved and continued in the actual possession of the same as according to the lines of the original purchase made by Pujol and Sanjurjo from said Romero as I am informed and believe to be true.

That I am, and my grantors and predecessors in interest have been, as I am informed and believe, in the actual and continued possession of said parcel of land, ever since the year 1847, according to the lines of their original purchase, made as aforesaid, which lands are designated as near as may be on the enclosed map.
27 That on the 23rd day of July, 1866, there was no adverse claim by any person for said land or any part thereof. That the same is not mineral land, and has not been reserved by the United States for any purpose whatsoever.

JOSEPH NAPHTALY, *Applicant.*

(Here follows map marked p. 27*a*.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Joseph Naphtaly, being duly sworn, deposes and says, that he is made the above-named applicant, that he has made the foregoing petition and application and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

JOSEPH NAPHTALY.

Subscribed and sworn to before me, on this 10th day of August, 1883.

WM. R. WHEATON, *Registrar.*

(Endorsed:) Filed August 10th, 1883. Wm. R. Wheaton, registrar."

Second. The defendants then offered in evidence the record of the Romero claim as it appears by the archives of the Mexican government now kept in the office of the surveyor general of the United States, at San Francisco, which is in words and figures as follows, to wit:

"YOUR EXCELLENCY:

The citizens Inocente, Jose and Mariano Romero, brothers, natives of this department before the righteous equity of Y. E., with due respect and according to law, state—

28 That last year we forwarded to Y. E. a petition soliciting a tract which is unoccupied in the neighborhood of the rancho of the Senor Don Joaquin Moraga, Don Lorenzo Pacheco and Julian Wil, being a remainder and over and above what belongs to the owner of said ranchos, and as said petition has been mislaid, we present ourselves anew to Your Excellency, hoping from your refined goodness and equity that you will please to decree in our favor, in case our request does not infringe upon the private property of any individual.

Wherefore, we humbly solicit and pray Y. E. to accede to our petition, whereof we will ever feel grateful, and we make oath that we do not proceed through malice, adding all other requisite verification, &c.

Monterey, January 18th, 1844.

INOCENTIO ROMERO.
JOSE ROMERO.
MARIANO ROMERO.

MONTEREY, *January 18th*, 1844.

Let the honl. sety. of state report having first taken such steps as he may deem necessary.

MICHELTORENA.

His E., the governor, decrees that the first alcalde of the town of San Jose report upon the contents of the foregoing petition, summoning the Senor Moraga, Pacheco and Wil, so that they may allege whatever cause they may deem proper, and all being concluded, let the papers be returned to this office.

Monterey, Jan., 1844.

MANUEL JIMENO.

29 The petitioners in this case and the owners—owners of lands bounded by the track which is claimed having been confronted, the latter said that they, Senoras Romero, did not prejudice them in any way, but, on the contrary, that they desired them to be their neighbors, both for company and for the additional security of their families in that region; it has also come to the knowledge of this tribunal that one Francisco Soto claimed the tract in question some six or seven years ago, but in this time he has neither used nor cultivated it in any way to give any right thereto. Wherefore, the petitioners appears to me entitled to the favor they ask.

ANTONIO MA. PICO.

Town of San Jose Guadalupe, Feb'y 1, 1844.

YOUR EXCELLENCY:

According to the report of the 1st alcalde of San Jose—after summons to the owners of the ranchos that bound the tract in question, and as to the good character of the claiming parties—it would seem that there is no obstacle to making the grant they claim, if Your Excellency approve of it.

MAN'L JIMENO.

MONTEREY, *Feb'y 14th*, 1844.

Let the judge of the proper district take measurement of the unoccupied land that is claimed in the presence of the neighbors, and certify the result so that it may be granted.

MICHELTORENA.

30 YOUR EXCELLENCY:

The citizens Inocencio, Mariano and Jose Romero, residents of this district, before the equity of Y. E., with due respect and to the full intent of the law, do set forth that we appeared before his honor, the judge of the pueblo of San Jose, to obtain that he should proceed to the measurement of the tract of land which we have solicited, according to the tenor of Y. E. decree of the 4th ulto., but that he was unable to execute that superior order, for the reason that the owners of the neighboring land whom we indicated were absent and engaged, and as it will happen Y. E. that these individuals will not meet very soon, for one or other of the two said causes, we see ourselves in the necessity of soliciting Y. E. to do us the favor of granting to us the said tract, either provisionally or in such a manner as Your Excellency shall deem fit, so that we may

(while it is yet time) commence our planting and other works; since the owners of the neighboring lands are satisfied with the boundaries we state and desirous of having us for neighbors, as appears from the report of the judge aforementioned and that of the honl. sety. of state enclosed in the official document, which we duly enclose to Your Excellency, together with the petition which contains the result to which we limit ourselves.

Wherefore, we solicit Your Excellency to accede to our request, thus conferring favor and justice; and we make oath according to law."

INOCENCIO ROMERO.
MARIANO ROMERO.
JOSE ROMERO.

Monterey, March 21st, 1844.

31 "YOUR EXCELLENCY:

"I think that Y. E.'s order should be carried into effect in regard to the measuring of the land that is claimed, and as soon as this is accomplished with the least practicable delay, Senor Romero can present himself, joined with Senor Soto, who says that he has a right to the same tract—your excellency's superior discernment will determine what is best.

"Monterey, March 23d, 1844.

"MANUEL JIMENO.

"MONTEREY, *March* 23*d*, 1844.

"Let everything be done agreeably to the foregoing report.

"MICHELTORENA."

Third. The defendants next offered in evidence the opinion and decree of the board of land commissioners in the matter of said Romero claim, which is in words and figures as follows, to wit:

"INOCENCIO ROMERO *et al.*
vs.
THE UNITED STATES. } No. 654.

Lands in Contra Costa county.

In this case the petitioners have placed on file copies of an expediente and proceedings preliminary to the issue of a grant for a surplus of several claims therein named.

The first expediente dated the 18th of January, 1844, and a correspondence kept up on the subject with the several departments of state to the year A. D. 1849.

32 But it does not appear that any grant was ever issued to any person and no equitable right appears on the part of any of the petitioners to a confirmation.

We are of the opinion that the claim is invalid and the decree will be entered adverse to the petitioners.

Rejected. Filed in office April 17th, 1855.

GEORGE FISHER, *Sec.*

(Marginal entry:) *Opinion by Com'r Farwell.*

(Title of case same as above.)

In this case, after hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioners is not valid, it is therefore decreed that the application for a confirmation thereof be denied.

R. AUG. THOMPSON,
L. B. FARWELL,
Commissioners.

Filed in office April 17th, 1855.

GEORGE FISHER, *Sec.*"

Fourth. The defendants also offered in evidence the opinion and decision of the United States district court in said Romero case made on or about October 5th, 1857, and reported in full in 1st Hoffman's Reports, page 219, entitled United States *vs.* Remero *et al.*

That said opinion and decision may be read, used and considered for all purposes herein with the same force and effect as if it had been copied and inserted in full in this bill of exceptions.

Fifth. The defendants also offered in evidence the opinion and decision of the Supreme Court of the United States, made in
33 said Romero case in the December term, 1863, and reported in full in vol. 1st, Wallace Reports, p. 721.

That said opinion and decision may be read, used and considered herein for all purposes, and with the like force and effect as though the same had been inserted in full in this bill of exceptions.

Sixth. The defendants further offered in evidence the decision and opinion of Wm. A. J. Sparks, Commissioner of the General Land Office, upon the application of the plaintiff to purchase said land of the United States.

The following is a portion of said opinion and decision:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *March 2d*, 1887.

"Register and receiver, San Francisco, Cala.

"GENTLEMEN: I have examined the contested case on appeal of Joseph Naphtaly *vs.* L. L. Bregard *et al.*, forwarded with your letter of February 26th, 1885, and involving rights to lands in township 1 north, range two west, and one south two west, M. D. M. The record status of the case is as follows: Joseph Naphtaly filed appli-

cation No. 95, August, 1883, to purchase under the 7th sec. act of July 23d, 1866. * * * The primary and controlling question in this case is, whether there is any basis for the claims of Naphtaly and Jones under the 7th section of the act of July 23d, 1866. Said section provides: 'That where persons in good faith and for
34 a valuable consideration have purchased lands from Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant and have used, improved and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title except that of the United States exists—such purchasers may purchase the same after having such land surveyed under existing laws at the minimum price established by law,'" etc.

It is claimed that this case falls under that part of the provisions relating to *rejected* grants and the questions which naturally and obviously arise are:

1st. Was there a Mexican grant?

2d. If so and not otherwise, there were grantees and assigns.

3d. Did persons in good faith and for a valuable consideration purchase lands from Mexican grantees or assigns?

4th. Was the purchase made before the grant was rejected?

5th. Has said purchaser used, improved and continued in the actual possession of the lands as according to the lines of original purchase?

The controlling question in the case, however, and upon which all others hinge, is: *Was there a grant?* Not a perfect grant in all its appointments, but one which was necessarily false, or forged or defective, on account of some technical non-conformity with the granting regulations, or invalid for want of authority in the
35 granting officials, or where it depended upon some determination of the court as to a particular feature of its essence.

In other words, the act has no relation to perfect grants, but to those which were so imperfect as to require their rejection.

This is manifestly a case in which there was no grant nor semblance of one.

It is based upon the assumption of a grant by Governor Micheltorena in the year 1844 to three brothers, Inocencio, Jose and Mariano Romero, for a sobrante of land lying between the ranchos of Moraga, Pacheco and Welsh. The board of land commissioners to whom the claim was referred for confirmation of title, said: "That it did not appear that any grant was ever issued to any person, and no equitable right appears on the part of any of the petitioners."

The U. S. district court, in its decision on appeal, held that *no grant, either perfect or incohate, was made, nor any promise given that one should be made.*

Hoffman's Rep'ts, Ex. 1, p. 219.

The U. S. Supreme Court on appeal, under consideration and comparison of the parole and documentary evidence of the case,

said: "The conclusion is irresistible that no grant ever issued by the governor."

1 Wall., 729.

If, then, as has been unequivocally decided by all the tribunals to which the claim has been referred, that there was no grant made either perfect or incohate nor any promise of one or any equitable rights attaching to any of the claimants, it must follow con-
36 clusively that the act of July 23rd, 1866, has no relevancy to the case in hand, and that the claim of Naphtaly and Jones must be rejected. * * *

Seventh. The defendants also offered in evidence the opinion and decision of Hon. W. F. Vilas, Secretary of the Interior of the United States, on appeal from the decision of the Commissioner of the General Land Office aforesaid, dated February 4th, 1889, and reported in full in vol. 8, Decisions of Department of the Interior, at p. 144.

That said opinion and decision may be read, used and considered herein for all purposes and with the like force and effect as though the same had been inserted in this bill of exceptions.

Eighth. The defendants also offered in evidence the opinion and decision of the Hon. George Chandler, acting Secretary of the Interior, dated June 23rd, 1891, upon plaintiff's motion for a review and reconsideration of said decision of Hon. W. F. Vilas, the late Secretary of the Interior, and which was duly presented to the Secretary of the Interior on March 1st, 1889, and reported in full in vol. 12, Decisions of Department of Interior, p. 667.

That said opinion and decision may be read, used and considered herein for all purposes and with like force and effect as though the same had been inserted in this bill of exceptions.

Ninth. The defendants also offered in evidence the opinion and decision of Hon. John W. Noble, Secretary of the Interior, dated May 18th, 1892, upon the matter of the application of the plaintiff to purchase said land. Such decision is reported in full in vol. 14, Decisions of Department of the Interior, page 536.

37 That said decision may be read, used and considered herein for all purposes and with like force and effect as though the same had been inserted in this bill of exceptions.

The plaintiff by his counsel objected to the introduction of each of the above documents in evidence on the ground that such evidence was immaterial, incompetent and irrelevant for the purpose of effecting the validity of said patents.

The court sustained said objection, to which ruling of the court the defendants by their counsel then and there duly excepted.

Here the defendants rested, and the court then, on the 23rd day of January, 1895, to which date the trial of said cause had been continued, ordered judgment to be entered in favor of the plaintiff

and against the defendants in accordance with the prayer of the complaint.

The defendants hereby present the foregoing as their bill of exceptions herein as amended and pray that the same be allowed and certified by the judge of this court.

H. F. CRANE &
PHILIP TEARE,
Att'ys for Def'ts.

The foregoing bill of exceptions is hereby approved and pl'ffs consent that the same may be so settled by the judge of this court.

NAPHTALY.
FREIDENRICH & ACKERMAN,
Att'ys for Pl'ff.

38 This is to certify that the above and foregoing bill of exceptions has been approved and settled by me.

JOSEPH McKENNA, *Judge.*

(Endorsed:) Filed March 5th, 1895. W. J. Costigan, clerk.

In the United States Circuit Court, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Petition of the Defendants for an Order Allowing a Writ of Error.

The defendants in the above-entitled cause feeling themselves aggrieved by the decision and judgment of said court, entered herein on the 21st day of February, 1895, whereby it was ordered, adjudged and decreed that the plaintiff do have and recover possession of the lands and premises described in said judgment, with costs. Now comes the said defendants, by H. F. Crane and Philip Teare, Esq's, their attorneys, and petition said court for an order allowing a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security, which the defendants shall give upon said writ of error and upon the giving of such security, that
39 all further proceedings in said court be suspended and stayed until the determination of said writ of error by said United States circuit court of appeals for the ninth circuit, and your petitioners will ever pray, etc.

H. F. CRANE AND
PHILIP TEARE,
Att'ys for Defendants.

Order Allowing Writ of Error and Fixing Bond.

Let the writ of error issue as prayed for.

It is further ordered, that the bond on writ of error be, and the

same is hereby, fixed at the sum of one thousand dollars, the same to stay all further proceedings in this court, until the final determination of the cause by the United States circuit court of appeals for the ninth circuit, and for damages and costs.

JOSEPH McKENNA,
Circuit Judge.

Dated San Francisco, Calif., Aug. 14th, 1895.

(Endorsed:) Filed August 14, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California.

JULIUS A. BELEY *et al.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 11900.

Assignment of Errors.

The decision and judgment of the court is erroneous in the following particulars, to wit:

40 First.

The court erred in denying the right of the defendants to prove on the trial that the patents put in evidence and alone relied upon by the defendant in error as the evidence of his title to the land described in the complaint, were issued by the officers of the Land Department of the United States without authority of law, and in the absence of any legislation by Congress giving them authority so to do.

Second.

The court erred in refusing to permit the plaintiffs in error to introduce evidence on the trial showing that on the 10th day of August, 1883, the defendant in error made a written application and filed the same in the United States Land Office claiming and asking leave to be permitted to purchase from the United States about three thousand (3,000) acres of the public lands, situate in Contra Costa county, California; stating, upon his oath, that said land was a part of a tract of land, granted by the Mexican government in the year 1844 to Inocencio Romero and others, and which land had been conveyed by said Romero, in the year 1853, to Domingo Pujol and Francisco Sanjurjo. That said claim of the Romeros to said land was finally rejected in the December term, of the year 1863, by the Supreme Court of the United States, and that on the 15th day of May, 1876, he, the defendant in error, had purchased said tract of land, and had by mesne conveyances, become the successor in interest of said Pujol, and Sanjurjo, and that he claimed the right to

purchase said tract of land, under and in pursuance of the
41 provisions of the 7th section of an act of Congress, entitled "An act to quiet land titles in California," approved July 23rd, 1866, and that the land described in said patents was a part of said tract.

Third.

The court erred in refusing to permit the plaintiffs in error to introduce in evidence, the entire and completed record of the Mexican government relating to said Romero claim; which shows that said Romeros did, on the 18th day of January, 1844, present a petition to the Mexican governor, Micheltorena, praying for a grant of certain land, embracing the land in controversy, that certain orders were made and entered in said record, viz: an order requiring an alcalde to make, examine, and report to the governor as to the condition of said land, the report of said alcalde, a further order of the governor, requiring the land to be measured and its boundaries ascertained, and that one De Soto who claimed some interest in the land be required to appear before him, to be examined as to the nature of his claim, that the owners of adjoining lands be required to be present at the fixing of the boundaries, etc.

That on the 27th of March, 1844, the Romeros make and present to the governor a second petition in which they seek to excuse themselves from the performance of the order relating to the measurement of the tract of land etc., and ask that a provisional grant be made them.

This is followed by a communication and report of the
42 secretary, Manuel Jimeno, to the governor, advising that the former order in regard to the measuring the land be insisted upon, and carried into effect, and that Senor Romero do appear, with Senor De Soto, who claims a right to the same tract of land.

March 23rd, 1844, the governor replies as follows, viz:

"Let everything be done agreeably to the foregoing report.

MICHELTORENA."

The above is the last entry in said record.

Fourth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence on the trial, showing that the board of land commissioners, the district and the supreme courts of the United States, upon the presentation of said Romero claim to said land and confirmation, each held, found, decreed and adjudged, at divers times on and prior to December, 1863, that no grant or semblance of a grant, or other evidence of right, title or interest had ever been issued or given by the Mexican government to said Romeros, or either of them, for said tract of land, or any part thereof, and that they, and neither of them, had ever acquired any interest or claim thereto, and that said claim was rejected by each of said tribunals upon that ground alone.

Fifth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that each of the officers of the
43 Land Department, in hearing and deciding upon the right of the plaintiff to purchase said tract of land, under said act of Congress, had full knowledge of the fact that said Romeros never had any claim to said land, and that the courts had so decided and adjudged, and that each of said officers well knew and expressly found, held, assumed and decided, as a matter of fact, that no grant or semblance of a grant or other evidence of claim or interest was ever given by the Mexican government to said Romeros, or any of them, or that they or any of them ever acquired any claim or interest in said land.

Sixth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that Hon. W. A. J. Sparks, the Commissioner of the General Land Office, on the 2d day of March, 1887, rejected the application of the plaintiff to purchase said land under said act of Congress; that he signed and filed a written decision in which he finds, declares and decides that the defendant in error was not a purchaser from a Mexican grantee or his assigns, or any person or persons who had any interest in said land; that the Romeros never had any grant or semblance of a grant from the Mexican government, and never acquired any claim to or interest in said land or any part thereof and that it had been so adjudged by the board of land commissioners and the district and supreme courts of the United States. That the 7th section of the act of Congress of July 23d, 1866, had no relevancy to the case of the plaintiff.

44 Seventh.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that the Hon. W. F. Vilas, as Secretary of the Interior of the United States, did on the 4th day of February, 1889, upon an appeal to him by the defendant in error in the matter of said application from the said decision of the Commissioner of the General Land Office, make and cause to be entered his final decision therein, wherein and whereby he approved and affirmed the finding of facts and the law as set forth in the decision of said commissioners as aforesaid, whereby said application of defendant in error was finally rejected by the Land Department of the United States. (Vol. 8, Decis. Dept. Int., page 144.)

Eighth.

The court erred in refusing to permit plaintiffs in error to introduce evidence showing, that on the 23d day of June, 1891, the Hon. John W. Noble, then Secretary of the Interior, and the successor in office of the said Hon. W. F. Vilas, caused to be entered an order purporting to grant to the defendant in error a rehearing of his said application. (Vol. 12, Decis. Dept. Int., page 667.)

Ninth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that on the 18th day of May, 1892, the Hon. John W. Noble, then Secretary of the Interior and successor in office of said Hon. W. F. Vilas, made a decision in the
45 matter of the application of the defendant in error upon the rehearing granted by him and upon the same facts found and made the basis of the decisions of said Commissioners of the General Land Office aforesaid and the said Hon. W. F. Vilas, Secretary of the Interior aforesaid, wherein and whereby the said Hon. John W. Noble decided that the defendant in error be permitted to purchase of the United States, said tract of land, containing about three thousand (3,000) acres of the public lands of the United States, under and by virtue of the 7th section of the act of Congress of July 23rd, 1866 (14 U. S. Stat. at Large, 218), and receive U. S. patents therefor.

Tenth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that said sale was made to the defendant in error and that the patents in evidence herein were issued to him embracing a portion of the tract of land described in the said application of the defendant in error, by virtue of said decision of said Hon. John W. Noble, and in pursuance of the provisions of the 7th section of said act of Congress aforesaid.

Eleventh.

The court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error, by assuming that the acts of the Land Department were conclusive of the rights of the parties under the provisions of the 7th section of the act of Congress, approved July 23rd, 1866, entitled "An act to quiet land titles in California."

46 Wherefore, the plaintiffs in error pray that the judgment of the circuit court of the United States, for the northern district of California, be reversed, and that the said circuit court be directed to grant a new trial herein.

H. F. CRANE AND
PHILIP TEARE,
Attorneys for Plaintiffs in Error.

(Endorsed:) Filed August 14, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

Bond on Writ of Error.

Know all men by these presents that I, Julius A. Beley, as principal, and David P. Smith and Mrs. Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of one thousand dollars, to be paid to the said Joseph Naphtaly, his certain attorneys, executors, administrators or assigns;

to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a circuit court of the United States, for the northern district of California, in a suit pending in said court, between Joseph Nathtaly, plaintiff, and Julius A. Beley, and others, defendants, a judgment was rendered against the said Julius A. Beley, and the said Beley having obtained from said court a
47 writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California, on the sixth day of September next:

Now, the condition of the above obligation is such, that if the said Julius A. Beley shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JULIUS A. BELEY. [SEAL.]
DAVID P. SMITH. [SEAL.]
MRS. MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

David P. Smith and Mrs. Marie C. Tackley, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of one thousand dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

DAVID P. SMITH.
MRS. MARIE C. TACKLEY.

48 Subscribed and sworn to before me this 19th day of August, A. D. 1895.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Form of bond and sufficiency of securities approved. Joseph McKenna, circuit judge. Filed Aug. 19, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Certificate to Transcript.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 55 inclusive, to be full, true and correct copies of the amended complaint filed June 15, 1894, answer of Beley, filed June 20, 1894; answer of Darling, filed June 20, 1894; judgment, entered February 21, 1895; motion for new trial; order denying motion for new trial; bill of exceptions as settled and
49 allowed; petition for and order allowing writ of error; assignment of errors and bond on writ of error, in the therein-entitled cause, as the same remain of record and on file in the office of the clerk of said court.

I further certify, that the cost of the foregoing copies is $32.90, and that said amount was paid by Julius A. Beley.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, this 2nd day of September, A. D. 1895.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Julius A. Beley, F. Darling and Charles Brigard, plaintiffs in error, and Joseph Naphtaly, defendant in error, a manifest error hath happened, to the great damage of the
50 said Julius A. Beley, F. Darling and Charles Brigard, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the second day of September next, in the said circuit court of appeals, to be then and there held, that the record and

proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.]

W. J. COSTIGAN,
Clerk of the United States Circuit Court for the Ninth Circuit, Northern District of California.

Allowed by:
JOSEPH McKENNA,
Circuit Judge.

51 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me, the undersigned, F. D. Monckton, commissioner U. S. circuit court, northern dist. of California, and clerk U. S. circuit court of appeals, ninth circuit, the subscriber, H. F. Crane, and makes oath that he delivered a true copy of the within writ of error to Joseph Naphtaly, personally, at his office, in the city and county of San Francisco, State of California, on the 19th day of August, 1895.

H. F. CRANE.

Sworn to and subscribed the 19th day of August, A. D. 1895.

[SEAL.]

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern Dist. of California, and Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

(Endorsed:) Original. United States circuit court of appeals for the ninth circuit. Julius A. Beley *et al.*, plaintiffs in error, *vs.* Joseph Naphtaly, defendant in error. Writ of error. Filed August 20, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

Return to Writ of Error.

The foregoing transcript of such portions of the record and proceedings in the cause in the preceding writ of error mentioned, as have been prepared at the request of the attorneys for the plaintiffs in error, and are by me certified to be true and correct, are,
52 at the request and direction of said attorneys for the plaintiffs in error, hereby annexed to said writ of error as the return thereto.

Attest:
[SEAL.]

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 2d day of September next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the northern district of California, in that certain action numbered 11900, in which Julius A. Beley, F. Darling and Charles Brigard are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, judge of the United States circuit court, in and for the northern district of California this 19th day of August, A. D. 1895.

JOSEPH McKENNA,
Judge U. S. Circuit Court, Northern District of California.

53 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me, the undersigned, F. D. Monckton, commissioner U. S. circuit court, northern district of California, and clerk U. S. circuit court of appeals, ninth circuit, the subscriber, H. F. Crane, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly, personally, at his office in the city and county of San Francisco, State of California, on the 19th day of August, 1895.

H. F. CRANE.

Sworn to and subscribed the 19th day of August, A. D. 1895.

[SEAL.] F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, and Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

(Endorsed:) Original. Citation. Filed August 20, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 251. In the United States circuit court of appeals, for the ninth circuit. Julius Beley, *et al.* plaintiffs in error, *vs.* Joseph Naphtaly, defendant in error. In error to the circuit court of the United States, for the ninth judicial circuit, in and for the northern district of California. Filed September 2d, 1895. F. D. Monckton, clerk.

54 In the United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS BELEY *et als.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 251.

Error to the circuit court of the United States for the northern district of California.

H. F. Crane and Philip Teare, for plaintiff- in error; A. L. Rhodes, for defendant in error.

Before Gilbert and Ross, circuit judges, and Morrow, district judge.

Ross, circuit judge, delivered the opinion of the court:

This action was brought by the plaintiff, defendant in error here, to recover the possession of various lots and parcels of land, described according to the public surveys of the United States, situated in Contra Costa county, California, and also damages for the withholding thereof, the plaintiff relying for title thereto upon two patents issued by the Government of the United States pursuant to an approved application by him to purchase the lands under and by virtue of the seventh section of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California" (14 Stats., 218). That section provides "that where persons, in good faith and for a valuable consideration, have purchased land of Mexican
55 grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same after having such lands surveyed under existing laws at the minimum price established by law, upon first making proofs of the facts as required in this section, under regulations to be provided by the Commissioner of the General Land Office."

The bill of exceptions recites that on the trial, after introducing the patents in evidence, the plaintiff proved that when he was in the quiet and peaceable possession of the lands the defendants entered thereon and ousted the plaintiff therefrom, and have since withheld the lands from him; that the plaintiff also proved the rental value of the premises, and that it was then admitted by the counsel for the defendants that at the time of the issuance of the patents the lands in question were public lands of the United States, subject to sale under its laws, and "that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein (and in the patents) or any part thereof, either by certificate of purchase, patent, or anything of the kind."

Confessedly, therefore, the defendants are mere naked trespassers.

As such they claimed the right in the court below to attack the validity of the patents issued to the plaintiff in the action, and for that purpose offered in evidence the following documents:

56 First. The application of the plaintiff to purchase the lands from the United States under and pursuant to the provisions of the seventh section of the act of July 23, 1866, which application set forth, among other things, that the lands were included within the exterior limits and formed part of a grant made by the Mexican government in the year 1844 to Inocencio, José, and Mariano Romero, three brothers, who presented their claim thereto for confirmation to the board of land commissioners created by the act of Congress of 1851 for the ascertainment and settlement of private land claims in California, which claim was rejected by the commission and afterwards, on appeal, by the United States district court for California and by the supreme court; that in 1846 or 1847 the Romero brothers partitioned the lands claimed by them under the grant, Inocencio taking that part thereof embraced within a certain enclosure and including the lands sought to be purchased by the applicant, and that In-cencio Romero used and cultivated the same until December 26, 1853, when he sold and conveyed the same for value to Domingo Pujol and Francisco Sanjurjo, who entered into possession of the lands within the enclosure and used, improved, and continued in the actual possession of those lands according to the lines of their original purchase until February 14, 1855, when they sold and conveyed the same for value to one J. W. Tice, who entered into the possession thereof, used, improved, and cultivated the same, and continued in the actual possession thereof until August 8, 1859, when he conveyed the same and transferred the possession thereof to one S. P. Millett; that Millett then entered into the possession of the lands so enclosed, used, improved, and cultivated the same and continued in the actual possession

57 thereof, according to the lines of the original purchase, until 1868, when he conveyed the same to D. P. Smith, who, in February, 1869, conveyed the same to J. P. Spring, who, in March, 1869, conveyed the same to Martin Clark, who, on May 15, 1876, conveyed the same to the applicant, Naphtaly; that the conveyance to Smith was made, according to the information and belief of the applicant, for the benefit of Millett, and the conveyances to Spring and Clark were made for the benefit of the applicant, who entered into the exclusive possession of the lands, according to the lines of the original purchase made by Pujol and Sanjurjo from Inocencio Romero, according to the information and belief of the applicant; that, according to his information and belief, the applicant and his grantors and predecessors in interest have been in the actual and continuous possession of the lands sought to be purchased by him ever since the year 1847, according to the lines of the original purchase; that on July 23, 1866, there was no adverse claim by any person to the lands or any part thereof; that they are not mineral lands and have not been reserved to the United States for any purpose.

Second. The record of the Romero claim from the office of the surveyor general of the United States for California.

Third. The opinion and decree of the board of land commissioners rejecting the claim.

Fourth. The opinion and judgment of the United States district court for the district of California, as reported in 1 Hoffman's Reports, 219, affirming the decision of the commissioners.

Fifth. The opinion and judgment of the Supreme Court of the United States, as reported in 1 Wallace's Reports, 721, affirming the decision of the district court.

Sixth. The opinion and decision of the Commissioner of
58 the General Land Office rejecting the application of Naphtaly to purchase the lands.

Seventh. The opinion and decision of Secretary of the Interior Vilas, as reported in volume 8 of the Decisions of the Department of the Interior, 144, affirming the decision of the Commissioner of the General Land Office.

Eighth. The opinion and decision of acting Secretary of the Interior Chandler, as reported in volume 12, Decisions of the Department of the Interior, 667, ordering a rehearing of the application to purchase.

Ninth. The opinion and decision of Secretary of the Interior Noble on the rehearing, as reported in volume 14 of the Decisions of the Department of the Interior, 536, approving the application and directing patents for the lands in question to be issued to the applicant.

To each and all of the documents so offered in evidence the plaintiff objected on the ground that such evidence was immaterial, incompetent, and irrelevant. The action of the court below in sustaining the objections and excluding the documents constitute the grounds of the appeal.

Assuming that the defendants, being admittedly mere naked trespassers upon the lands in question, are entitled to attack the patents issued to the plaintiff, we proceed to inquire whether any of the documents offered in evidence tend to affect their validity.

Beyond question the patents are absolutely conclusive in respect to all matters of fact properly cognizable by the officers of the Land Department. The decisions of the Supreme Court and of other courts to this effect are so numerous as to render their citation no
59 longer necessary. The real ground of the defendants' contention, however, is that, inasmuch as it was found and held by the United States tribunals that no grant was ever made by the Mexican government to the Romeros, nor anything in the semblance of a grant, there was absolutely no case presented by the applicant, Naphtaly, to the officers of the Land Department for the application of the provisions of the seventh section of the act of Congress of July 23, 1866, and that the disposal of the lands in question to the applicant by virtue of those provisions was beyond the power of the Secretary of the Interior because unauthorized by law.

It is also contended by defendants that one Secretary of the Inte-

rior has no power to grant a rehearing of a case decided by his predecessor, and that the reconsideration of Naphtaly's application to purchase by Mr. Secretary Noble and its allowance by him was, therefore, without authority of law and void. Noble *vs.* Union River Logging Co., 147 U. S., 165, and United States *vs.* Stone, 2 Wall., 537, are cited in support of this position, but neither of those cases at all support it. In Noble *vs.* Union River Logging Company, the company, desiring to avail itself of the act of Congress of March 3, 1875 (18 Stats., 482), granting to railroads a right of way through the public lands, took the steps required by the statute to secure that right. When all of those requirements had been observed the Secretary of the Interior was authorized to approve the profile of the road and to cause such approval to be noted upon the plats in the land office of the district where such land was located, and thereupon the granting section of the act became operative and vested in the company the right of way. The court held that after this was done it was beyond the power of a succeeding Secretary to revoke the
60 action of his predecessor in office, for the title had already passed to the grantee. In United States *vs.* Stone the Secretary of the Interior undertook to revoke a patent that had been signed by the President and issued. But where, as in this case, no steps had been taken even looking to the conclusion of the proceedings in accordance with the ruling of the Secretary of the Interior, there can be no doubt of his power or of that of his successor in office, upon a seasonable application, to reconsider any ruling in respect to the proper disposition of the land. As said by the Supreme Court, in New Orleans *vs.* Paine, 147 U. S., 261, "until the matter is closed by final action the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing." See also United States *vs.* Schurz, 102 U. S., 378; Le Roy *vs.* Jamison, 3 Saw., 389.

The documents offered in evidence bearing date during the Mexican rule are as follows:

1. A petition signed by the claimants and dated at Monterey on the 18th day of January, 1844, wherein they solicit a grant of a certain tract of land described as a *sobrante* of three adjacent ranchos.

2. Connected with the petition is a marginal decree of the same date directing the Secretary to report upon the subject, "having first taken such steps as he may deem necessary."

3. Certificate of the Secretary, also of the same date, that the governor directs the first alcalde of San José to summon the occupants of the adjacent ranchos and hear their allegations and make report of his doings.

4. Report of the alcalde, under date 1st of February of the
61 same year, to the effect that the rancheros mentioned and the petitioners had been confronted, and that the former made no objection to the application; but he also reported that it had come to his knowledge that one Francisco Soto, six or seven years before, had claimed the same tract.

5. Ten days after that document was filed the Secretary reported to the governor that it would seem, according to that report, that there was no obstacle to the making of the grant.

6. Subsequently, however, the governor entered a decree directing the judge of the proper district to take measurements of the land in the presence of the adjacent proprietors, and that he "certify the result, so that it may be granted to the petitioners."

7. Second petition of the claimants, under date of the 21st of March, 1844, in which they stated that the judge of San José had never been able to execute the order of survey on account of the absence or engagements of the adjacent proprietors, and asked that the governor would grant the tract to them provisionally or in such manner as he should deem fit.

8. The record contains no order of reference of the second petition, but the Secretary two days after its date made a report to the governor, expressing the opinion that the former order of survey ought first to be carried into effect, and when the survey should be made the suggestion was that the prior claimant and the petitioners should be confronted in order that the governor might be able to "determine what is best."

9. Final degree of the governor is in the words following, to wit: "Let everything be done agreeably to the foregoing report," which concludes the record of the Mexican documents offered
62 in evidence.

The Supreme Court held, in the case of Romero *vs.* United States, 68 U. S., 740, that those documents afforded no evidence that a grant or concession of any kind was ever issued by the Mexican government to the Romeros, but that, on the contrary, "the documents, as a whole, fully show that up to the date of the last-named decree no such grant had ever been issued. Survey of the tract," continued the court, "was first to be made, and the parties supposed to be opposed in interest were then to be summoned and heard as preliminary conditions to the hearing of the application. Record furnishes no evidence of a reliable character that either of those conditions was ever fulfilled. Evidence to show that the survey was made is entirely wanting. First-named claimant was summoned as a witness, and he testified that the pretensions of the prior claimants were overruled and abandoned, but the explanations given by him, in view of the documents in the case, are not satisfactory."

The court found the parol evidence tending to show the issuance and existence of the claimed grant to be insufficient to overcome the conclusive nature of the documentary evidence and accordingly affirmed the decree of the district court, thus finally, in December, 1863, rejecting the claim of the Romeros. Prior to this final rejection, however, Inocencio Romero, to wit, on December 26, 1853, according to the facts as alleged before the officers of the Land Department and conclusively passed upon by them, sold and conveyed for value to Domingo Pujol and Francisco Sanjurjo that portion of the lands embraced within the Mexican claim which was within the enclosure mentioned and which was set apart to him in
63 the partition of 1846 or 1847, and which, according to the allegations there made and passed upon, he had ever since

used and cultivated; and, through subsequent mesne conveyances, the same right and interest passed to S. P. Millett August 8, 1859, who then entered into the possession of the lands in question, used, improved, and cultivated the same and continued in the actual possession thereof according to the lines of the original purchase at the time of and after the passage of the act of Congress of July 23, 1866.

At that date—July 23, 1866—the lands in question being public lands of the United States not reserved for any purpose whatever and to which no adverse claim of any nature existed, and Millett being a grantee for value under Inocencio Romero and having purchased in good faith while the claim to the land under the alleged Mexican grant was being prosecuted before the tribunals authorized by law to settle such claims and before its rejection, there can be no doubt, we think, that Millett was entitled to purchase the lands under the provisions of the seventh section of the act of July 23, 1866. It was for the very purpose of meeting and obviating the hardships resulting from the rejection in numerous instances of claims to lands under supposed or defective Mexican grants that this act was passed. It was strictly remedial in its nature and, as such, should receive a broad and liberal construction, to the end that its purposes be accomplished and not defeated. Indeed, it is not unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect in order "to include cases within the same mischief" (Dean of York *vs.* Middleburg, Y. & J. Exch. Rep., 196; see also Potter's Dwarris, p. 231; United States *vs.*
64 Wiltberger, 5 Wheat., 76; American Fire Co. *vs.* United States, 2 Pet., 358; United States *vs.* Hodson, 10 Wall., 395; White *vs.* Steam Tug Mary Ann, 6 Cal., 462; Jackson *vs.* Warren, 32 Ill., 321); but certainly, as respects Millett, there is no need to extend the natural meaning of the words of the act of 1866 to bring him within the beneficent provisions of its seventh section. The fact that it was determined by all of the United States tribunals charged with the duty of deciding the question that there never was, in fact, any grant or concession by the Mexican government to the Romeros, and that their claim to lands under the alleged grant was rejected, does not render the act inapplicable to Millett. When he purchased in good faith and for value from an intermediate grantee of In-cencio Romero the claim was being earnestly pressed before the courts of the United States that there was such a grant, and their records show that there was parol evidence of its actual issuance and existence. Besides, the issuance of a grant was not always essential to the confirmation of such a claim. In the case of The United States *vs.* Alviso, 23 How., 313, the Supreme Court refused to disturb and affirmed the decree of the court below confirming a claim to land where no grant was in fact issued by the Mexican authorities, but where, pending the proceedings by those authorities upon the petition for the grant, the petitioner was given permission to occupy the land, then vacant, which he did for fourteen years, during which time he was recognized as its owner and possessed the requisite qualifications, and no suspicion existed unfavorable to the *bona fides* of

his petition or the continuity of his possession and claim and where there was no adverse claim.

Surely one who purchased in good faith and for value the land under such a claim as that of the Romeros before its final
65 rejection is as much entitled to the preferred right conferred by the seventh section of the act of July 23, 1866, as is one who makes a similar purchase under a supposed grant afterwards adjudged to be forged or otherwise fraudulent. It was, as has been said, to meet and obviate the hardships growing out of all such and similar cases that the act in question was passed.

But before the right conferred by the seventh section of the act of July 23, 1866, upon Millett could be exercised a survey of the lands and the filing of the plats thereof by the Government of the United States was necessary. It appears, from the decision of the Secretary of the Interior (vol. 8, Decisions of the Department of the Interior, 144) that the township plats of such survey embracing the lands in question were filed in the local land office July 30, 1878, for township one south and on October 5, 1878, for township 1 north. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883. On August 10, 1883, Naphtaly filed his application to purchase. Had the preferred right of purchass conferred by the seventh section of the act of July 23, 1866, on Millett remained in him, certainly he could not have exercised it earlier than July 30, 1878, when the first of the township plats was filed in the local land office. Suppose, while that right thus existed in him without the power to exercise it, because of the failure of the Government to survey the land, Millett had died, would not the right have passed to his heirs? Undoubtedly so. It is equally clear, we think, that it was assignable. It is elementary that every right, title, interest, or claim in lands is assignable or descends to heirs un-
66 less such transfer or descent is prohibited by statute (Co. Litt., 46*b*; Washburn on Real Prop., ch. 1, sec. 20; Myers *vs.* Croft, 13 Wall., 291; Lamb *vs.* Davenport, *id.*, 418). The act of July 23, 1866, places no such restriction, limitation, or condition upon the right therein created. The preferred right of purchase thereby given is analogous to the pre-emption laws of April 12, 1814 (3 Stats., 122), and June 19, 1834 (4 Stats., 678), which right the Supreme Court held, in Thredgill *vs.* Pintard (12 How., 24), was assignable. The only difference between the two is that the preferred right of purchase given by the act of 1866 is based on conditions precedent, while the right of pre-emption given by the acts of 1814 and 1834 was based on conditions subsequent, a difference wholly unimportant in determining the nature and extent of the right.

In Lamb *vs.* Davenport, 18 Wall., 307, the Supreme Court held that unless forbidden by some positive law contracts made by actual settlers on the public lands concerning their possessory rights and concerning the title to be acquired in future from the United States are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and

though the Government is under no obligation to either of the parties in regard to the title, and, accordingly, that the right of entry conferred by the Oregon donation act of September 27, 1850 (9 Stats., 496), enured to the benefit of grantees under the prior possessory right.

Such authoritative recognition of the assignability, in the absence of statutory prohibition, of such possessory rights and right
67 of pre-emption is, in our judgment, conclusive in favor of the assignability of the preferred right of purchase given by the seventh section of the act of July 23, 1866. This view was adopted by the Secretary of the Interior in 1873, and has ever since prevailed in the Land Department. (Wilson *vs.* C. & O. R. R. Co., 1 C. C. L., 471; Owen *vs.* Stevens, 3 L. D., 401; Welch *vs.* Molino, 7 L. D., 210.)

It is true, as urged on the part of the defendants, that Naphtaly purchased with notice of the final rejection of the Mexican claim, but it is equally true that he purchased with knowledge of the act of July 23, 1866, and with a knowledge that under that act there existed in his grantor a preferred right of purchase which was assignable and which he had the legal right to purchase and which he did purchase in good faith and for value. In respect to all matters of fact, such as the possession, use, and improvement of the lands, the respective purchases, how and for what made, the patent, as has been said, is conclusive; and, holding, as we do, that the preferred right of purchase is assignable, it results that the preferred evidence, had it been admitted, could not have affected the validity of the plaintiff's patents.

We are of opinion, further, that the court below did not err in sustaining the objections to the evidence offered by the defendants. Admitting, as they did, that the lands in question were public lands of the United States, subject to sale under its laws, for which the plaintiff brought into court patents of the United States regular in form, those instruments are absolutely conclusive against any collateral attack by mere intruders upon the lands covered by them, such as the defendants confess themselves to be. (Smelting
68 Co. *vs.* Kemp, 104 U. S., 546; Steel *vs.* Smelting Co., 106 U. S., 447; Barden *vs.* Railroad Co., 154 U. S., 328; Buena Vista Petroleum Co. *vs.* Tulare Oil & Mining Co., 67 Fed. Rep., 226; United States *vs.* Winona & St. P. R. Co. *et al.*, *id.*, 948.)

Judgment affirmed.

(Endorsed:) Opinion. Filed Feb. 3, 1896. F. D. Monckton, clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY, F. DARLING, and CHARLES BRIGARD, Plaintiffs in Error, *vs.* JOSEPH NAPHTALY. } No. 251.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Feb. 3, 1896. F. D. Monckton, clerk.

70 Supreme Court of the United States, D. C.

JULIUS A. BELEY *et al.*, Pl'ffs in Error, *vs.* JOSEPH NAPHTALY, Def't in Error.

Petition on Behalf of Pl'ffs in Error that a Writ of Error be Issued Out of Above Court.

The plaintiffs in error in this cause, feeling themselves aggrieved by the decision and judgment of the U. S. circuit court of appeals, 9th circuit, northern district of California, entered herein on the 3d day of February, 1896, whereby it was ordered, adjudged, and decreed that a judgment heretofore made and entered in the U. S. circuit court on the 21st day of February, 1895, for the recovery of the possession of certain lands described therein, with costs, be affirmed—

Now comes the plaintiffs in error, by their attorneys, and petition the court first above named that a writ of error do issue out of said court under and in accordance with the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security which the plaintiffs in error shall give upon said writ of error, and upon the giving of such security that all further proceedings in said circuit court be suspended and stayed until the determination of said writ of error by said U. S. Supreme
71 Court; and your petitioners will ever pray, etc.

HENRY F. CRANE,
PHILIP TEARE,
Att'ys for Pl'ffs in Error.

Let the writ of error issue as prayed. The bond is fixed in the sum of five thousand dollars, the same to stay all further proceedings in the circuit court until final determination of cause and for damages and costs.

(Endorsed:) Petition for writ of error. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

72 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY *et al.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 251.

Assignments of Error in U. S. Supreme Court.

1st. The court erred in holding that plaintiffs in error as against the defendant in error were and are naked trespassers on the land because they could not connect themselves with any title from the United States.

2nd. The court erred in holding that because the plaintiffs in error were unable to connect themselves with the title of the United States they could not be permitted to show that the patents in evidence were issued without authority of law and were therefore void.

3rd. The court erred in holding that after the Commissioner of the General Land Office and the Secretary of the Interior had heard, tried, and finally determined the right of the defendant in error to purchase said land under the 7th section, act of July 23d, 1866, still such determination was not final in the Land Department, and that a succeeding Secretary had the power and right to reopen the matter and permit such purchase after it had been finally rejected by said former final determination.

4th. The court erred in assuming and holding that the defendant in error was a person who had in good faith and for a valuable
73 consideration purchased said land of a Mexican grantee or assigns, which grant had subsequently been rejected, and who had used, improved, and continued in the actual possession of the same according to the lines of his original purchase.

5th. The court erred in assuming that said 3,000 acres of land or any part thereof had ever been enclosed in any manner or ever had any ascertained boundary lines or any known boundaries whatever.

6th. The court erred in assuming and holding that the rights conferred by section 7, act of July 23, 1866, could not be made available until the United States public surveys had been made and run on the land.

7th. The court erred in assuming and holding that S. P. Millett was in October, 1859, or at any time a purchaser of said land in good faith under the provisions of said statute or for a valuable consideration, or was such a purchaser as contemplated by said statute, and that he became entitled to make any purchase of said land thereunder.

8th. The court erred in holding that the defendant in error, by becoming a remote purchaser of a possessory claim of an indefinite and undescribed tract of the public land from said Millett in May, 1875, by mesne conveyance, thereby acquired the right in 1883 to

cause 3,000 acres of the public land in Contra Costa county, California, to be surveyed and platted and to purchase the same from the United States.

9th. The court erred in holding in effect that the decision of Secretary Noble in allowing and permitting such purchase by the defendant in error was and is conclusive upon the plaintiffs in error upon all questions of law and fact.

10th. The court erred in holding said sale and the patents issued to defendant thereunder and in pursuance thereof to be legal and valid and to pass the title of said land to defendant in error,
74 and erred in affirming the judgment of the circuit court herein.

Wherefore plaintiffs in error pray that the judgment of the U. S. circuit court of appeals be reversed, and that the cause be remanded with direction that the judgment of the circuit court be set aside and a new trial ordered.

H. F. CRANE,
Of Counsel for Pl'ffs in Error.

(Endorsed:) Amended assignment of errors. Filed May 8th, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

75 Know all men by these presents that we, Julius A. Beley, F. Darling, and Charles Brigard, as principals, and David P. Smith and Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of five thousand dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a U. S. circuit court of appeals *of the United States* for the ninth circuit, in a suit depending in said court between Julius A. Beley, F. Darling, and Charles Brigard, as plaintiffs in error, and Joseph Naphtaly, as defendant in error, a judgment and decree was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained or being about to obtain from the Supreme Court of the United States a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, defendant in error, being about to issue, citing and admonishing him to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, District of Columbia, at a time to be fixed by said court:

Now, the condition of the above obligation is such that if the said Julius A. Beley, F. Darling, and Charles Brigard shall
76 prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID P. SMITH. [SEAL.]
MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

David P. Smith and Marie C. Tackley, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

DAVID P. SMITH.
MARIE C. TACKLEY.

Subscribed and sworn to before me this 16th day of March, A. D. 1896.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

Approved:
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Washington, D. C., March 23, 1896.

(Endorsed:) Bond on writ of error. Sufficiency of securities approved. Joseph McKenna, circuit judge. Filed March 31, 1896. F. D. Monckton, clerk.

77 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY, F. DARLING, and CHARLES BRIGARD,
Plaintiffs in Error,
vs.
JOSEPH NAPHTALY.
} No. 251.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing seventy-six (76) pages, numbered from one (1) to seventy-six (76), inclusive, to be a full, true, and correct copy of the printed transcript of record in the above-entitled cause and of all proceedings in our said United States circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 7th day of April, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Julius A. Beley, F. Darling, and Charles Drigard, plaintiffs in error, and Joseph Napthaly, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

79 [Endorsed:] D. No. 251. Julius A. Beley *et al. v.* Joseph Naphtaly. Writ of error. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

I admit service upon me of a copy of the within citation, at San Francisco, California, this thirty-first day of March, A. D. 1896.

JOSEPH NAPHTALY,
Defendant in Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said United States circuit court of appeals, to the Supreme Court of the United States, within mentioned, at a day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

80 UNITED STATES OF AMERICA, *ss:*

To Joseph Napthaly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Julius A. Beley, F. Darling, and Charles Drigard are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 23d day of March, in the year of our Lord one thousand eight hundred and ni[illegible]-six.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

81 [Endorsed:] D. 251. Julius A. Beley *et al. v.* Joseph Naphtaly. Citation. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

On this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared H. F. Crane before me, the subscriber, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly at the city and county of San Francisco, State of California, on the day and year above written.

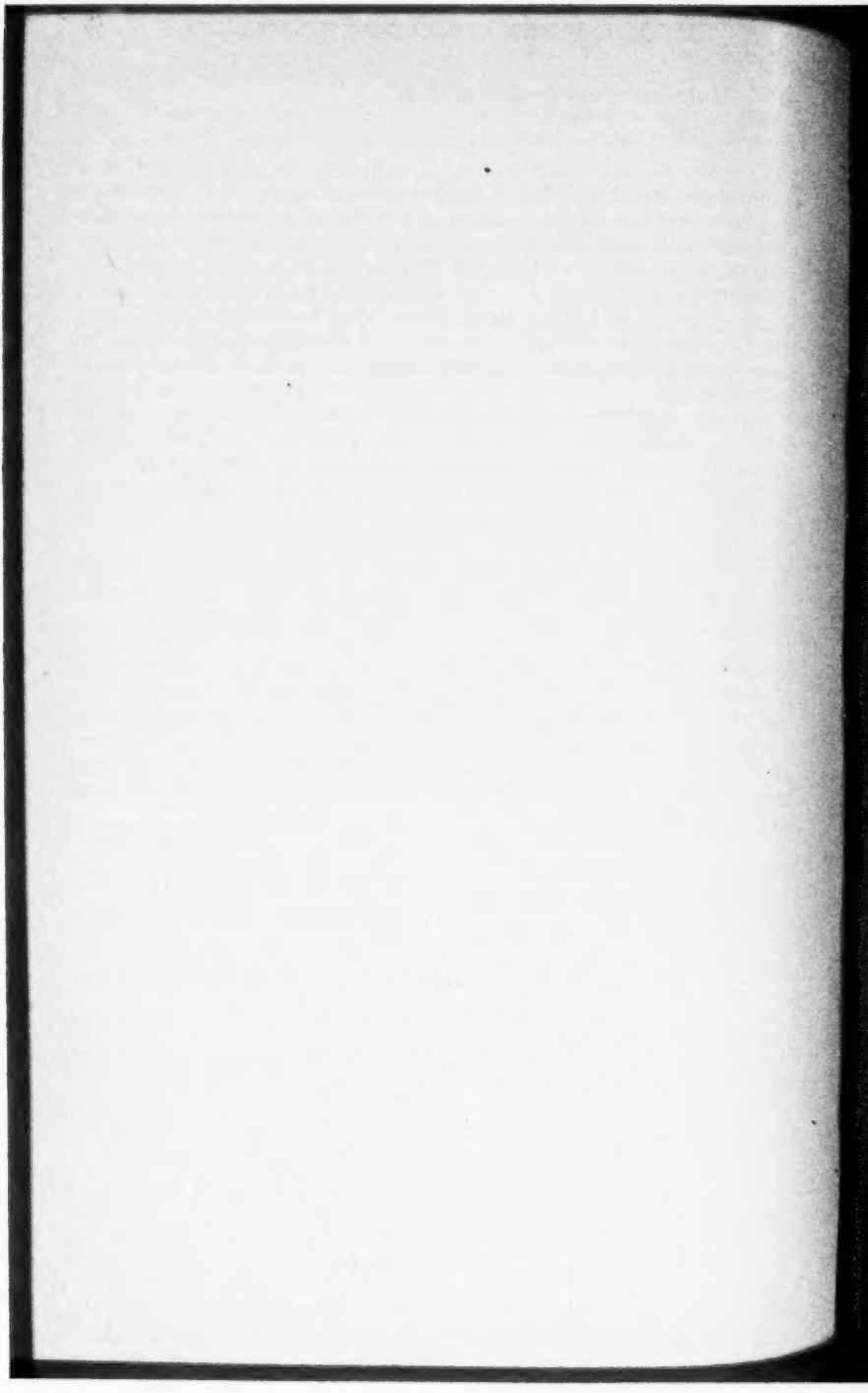
H. F. CRANE.

Sworn to and subscribed the 31st day of March, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: Case No. 16,303. U. S. circuit court of appeals, 9th circuit. Term No., 180. Julius A. Beley, F. Darling, and Charles Drigard, plaintiffs in error, *vs.* Joseph Naphtaly. Filed May 20, 1896.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 163.

JOSIAH S. SMITH, APPELLANT,

vs.

JOSEPH RAFFERTY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 26, 1898.

(16,394.)

(16,304.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 181.

JOSIAH S. SMITH, APPELLANT,

vs.

JOSEPH NAPHTALY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1897.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Amended Complaint.

iah S. Smith, the plaintiff above named, now comes and by of court files this, his amended complaint herein, and for his of action and the relief herein prayed, avers and shows to the the following facts, viz:

I.

it he is the equitable o er and entitled to the exclusive pos- n of that certain piece and, situate, lying and being in the y of Contra Costa, State . California, designated and described northeast quarter of section ten, in township one, south of two, west of the Mount Diablo base and meridian, contain- out 160 acres of land as shown by the public surveys of said hip. That at all the times mentioned herein said land was ow is public land of the United States, and subject to pre- on, settlement and purchase under the conditions and provis- f the laws of the United States in that behalf. That the iff was, and now is, a native-born citizen of the United States, he age of twenty-one years, the head of a family, and in all things qualified to avail himself of the rights of a pre-emption settler upon the purchaser of 160 acres of the public lands of the United States under and in pursuance of the laws enacted ngress in that behalf.

II.

it the right, title and interest which the plaintiff claims in and tract of land above described, arises by virtue of and is based the following facts, to wit: that in or about the month of , 1875, the plaintiff made a settlement in person upon said which was then unsurveyed public land. That he made such ment for the sole purpose of acquiring the title thereto from nited States by pre-emption, and to make the same a home for lf and his family. That he erected a substantial dwelling- thereon in which he and his family have since resided; built and other outhouses, cultivated said land from year to year, g hay, grain and other produce thereon, planted an orchard it trees, and enclosed the land with a substantial fence, and uch improvements are of the value of two thousand dollars. in or about the month of August, 1878, the township embrac- id land having been surveyed and sectionized by the surveyor al of the United States, and a plat of said survey having been

placed on file in the United States land office at San Francisco for the land district embracing said land, and no claim other than plaintiff's for said land having been made at said office, the plaintiff did on said last-named date make and file in said land office his declaratory statement in writing, whereby he gave notice of his said
3 settlement on said land, and therein declared his intention to purchase said land from the United States under and in pursuance of the acts of Congress relative to the pre-emption and purchase of the public lands of the United States, and then and there paid to the receiver of said land office the fees and charges for such filing.

That at all times since said filing of his declaratory statement, the plaintiff has been ready, anxious and willing, and has at divers times at said land office since said last-named date, offered and demanded to be permitted to make proof of his right to purchase said land of the United States, but has at all times, and now is, hindered and prevented from so doing by the adverse and groundless claim of the defendant to said land, as is hereinafter more fully shown.

III.

And the plaintiff further charges and avers, that since in or about the year 1877, the defendant, Joseph Naphtaly, has claimed some estate or interest in the tract of land above described and upon which the plaintiff has made his settlement and improvements, as aforesaid; that such claim is adverse to the right, interest and estate of the plaintiff of, in and to said land, as hereinbefore shown, and said adverse claim has since the year 1878 hindered and prevented the plaintiff from the exercise of his right to enter said land at the land office and receive a patent therefor under the laws of the United States as a pre-emptor. That such adverse claim of the defendant is utterly groundless and is of no force or effect, either in law or equity, and this suit is brought to have such claim determined.

4 IV.

And the plaintiff further avers and charges that said adverse claim is based solely upon the assumption that some time in the year 1844 one Inocencio Romero and his brothers, Jose and Mariano Romero, obtained and received from the Mexican government a grant of a large tract of land situate in Contra Costa county, California; that a pretended partition was made of said tract by said Inocencio, Jose and Mariano Romero whereby said Inocencio Romero was awarded in severalty about three thousand acres of said tract of which the one hundred and sixty acres claimed by the plaintiff, as aforesaid, is a part, and that on, or about the 15th day of May, 1876, the defendant had become, by mesne conveyance, a purchaser of the interest of Inocencio Romero in said three thousand acres of land. That the facts concerning said Romero claim and the claim of the defendants are as follows, to wit:

That on, or about January 18th, 1844, said Romero brothers pre-

sented their joint petition to the Mexican governor at Monterey, California, praying that a grant be made to them by the governor of the tract of land before mentioned under and in pursuance of the laws and customs of the Mexican government; that, thereupon, the governor caused an order to be made to the effect that said petitioners do make and present to him a measurement and description of the land prayed for, and also appear before him and bring with them one Senor Sato, who was reputed to be in possession of and making claim to the same tract of land.

That said Romeros, the petitioners, neglected and failed to
5 comply with said order, or any part thereof, and no further proceeding was taken or act done in the premises concerning the petition by or before the governor, and no grant or semblance of a grant was ever made to said Romeros, or any person, or persons, for said land, or any part thereof, and neither of said Romeros ever had or acquired any color of right, title, estate, interest or claim of, in or to said land, or any part thereof, under said Mexican government, or from any source whatever.

V.

That notwithstanding the aforesaid facts, said Romeros did set up a claim to said land and present the same for confirmation under the act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3rd, 1851. That such proceedings were had and taken in said matter, that on the 17th day of April, 1855, the board of land commissioners created by said act found, held and decided that no grant was ever issued to any person, and no equitable right appeared on the part of any of the petitioners to a confirmation. And, on appeal, the district and Supreme Courts of the United States found, held and decided that no grant or semblance of a grant had ever been made to the Romeros, or any of them, for said land, or any part thereof (1 Hoffman, 219; 1 Wall, 721), and on that ground alone the said claim was rejected. That said decision of the Supreme Court was made at the December term of said court, 1863.

VI.

That on the 10th day of August, 1883, the defendant,
6 Joseph Naphtaly, having become in the year 1876, as aforesaid, by mesne conveyance, the grantee of said Inocencio Romero for said three thousand acres of land, made and presented at the United States land office at San Francisco, California, a petition duly verified by his oath, wherein he alleged that said three thousand acres of land, so purchased by him, was embraced by the boundaries and formed a part of a tract of land granted by the Mexican government in the year 1844, to Inocencio, Jose and Mariano Romero, and that in 1863, their claim had been rejected by the Supreme Court of the United States, and that he sought to purchase said land from the United States solely under the provisions of the 7th section of an act of Congress entitled "An act to quiet land titles

in California," approved July 23rd, 1866. That at the time the defendant purchased said interest of Inocencio Romero in 1875, and at the time he filed said petition in 1883, and for a long time prior thereto, he and his grantors had full knowledge that no grant, or semblance of a grant, had ever been made for said land. That such proceedings were afterwards had and taken upon the petition of the defendant in the Land Department of the United States and before the officers thereof that on the 2nd day of March, 1887, the Hon. Wm. A. J. Sparks, Commissioner of the General Land Office, rejected the claim of the defendant and refused to permit him to purchase said land, or any part thereof, under the 7th section of the said act of Congress of July 23rd, 1866, on the ground that said Romero never had any grant, or color of interest, right or claim to said land, and on the 4th day of February, 1889,

7 the Hon. W. F. Vilas, Secretary of the Interior of the United States, on an appeal to him, concurred with said Commissioner Sparks, and affirmed the decision made by him, as aforesaid. That in, or about the month of March, 1889, the defendant made application to the Hon. John W. Noble, then Secretary of the Interior, and the successor in office of said Hon. W. F. Vilas, for a rehearing of matters contained in said petition, and on the 23rd day of June, 1891, such rehearing was granted, and on such rehearing such proceedings were afterwards had and taken that on the 18th day of May, 1892, said Hon. John W. Noble, as Secretary of the Interior of the United States, and the successor in office of said Hon. W. F. Vilas, made an order purporting to grant to the defendant the right to purchase said three thousand acres of land under and by virtue of the 7th section of said act of Congress of July 23rd, 1866. That upon said rehearing and at the time of the granting of said order permitting said purchase, said Hon. John W. Noble had full knowledge of all the facts herein stated and that no grant, or semblance of a grant, had ever been issued by the Mexican government to said Romeros, or any of them, for said land, or any part thereof. And the plaintiff charges and avers that said Hon. John W. Noble in assuming to grant said rehearing, and in assuming to hear, try and determine the matter of said petition *de novo* and in granting the prayer of said petition after the same had been fully heard, tried and determined by his predecessors in office, acted without authority of law, and his acts in that behalf were and are void and of no effect.

8 And the plaintiff further charges and avers that in permitting the defendant to purchase said three thousand acres of the public lands of the United States, the said Secretary of the Interior acted without authority of law in this, to wit: that neither the 7th section of the said act of Congress of July 23rd, 1866, or any act of Congress, authorized said sale to be made by the Land Department of the United States, or by any officer thereof, and said land was so caused to be sold in the absence of any legislation authorizing such sale, and that such sale was, and is void and of no effect.

That under color of said order of the Hon. John W. Noble, grant-

ing the prayer of said petition of the defendant to purchase said land, as aforesaid, divers patents of the United States were caused to be issued by the officers of the Land Department of the United States, purporting to grant to the defendant said three thousand acres of land in separate tracts and parcels, one of which patents purports to grant to the defendant the one hundred and sixty acres of land first above described and upon which the plaintiff has his settlement and improvements, as before shown. That each of said patents falsely recites upon its face that it was issued by virtue of the provisions of act of Congress of the 24th of April, 1820, and the acts supplemental thereto, when in truth, and in fact each of said patents were issued under color of the sale permitted to be made by said Secretary of the Interior, as before shown, and under the pretext that such sale was authorized by the 7th section of the act of Congress entitled, "An act to quiet land titles in California," approved July 23rd, 1866, and no other act of Congress.

9 That by means of said patent the defendant makes such adverse claim, as aforesaid, to said 160 acres of land as against plaintiff, and is threatening to make use of the same in the courts, and causing the plaintiff to be dispossessed of said land and deprived of his said improvements thereon, and that by means of said sale and patent and such proceedings in said Land Departments on behalf of the defendant, the plaintiff is hindered and prevented from procuring the title of the United States to said land, under and in pursuance of the pre-emption laws of the United States, and that the plaintiff has no plain, adequate or complete remedy at law in the premises.

Wherefore, the plaintiff prays that the court adjudge and decree that the pretended sale of said 160 acres of land, described in the complaint, to defendant, and upon which the plaintiff has made his said settlement and improvements was without authority of law and void.

That the patent issued by the Land Department of the United States purporting to grant said land to the defendant is of no legal force or effect, and that the defendant has no estate, right or title to said land adverse to the plaintiff.

That the defendant be forever enjoined and restrained from setting up or asserting any right or claim to said land adversely to the plaintiff.

And that it be ordered, adjudged and decreed that as against the defendant and his heirs and assigns, that the plaintiff is en-

10 titled to the peaceable and exclusive possession of said 160 acres of land, and that the court do grant such other and further relief as may be meet and proper.

HENRY F. CRANE AND
PHILIP TEARE AND
A. C. SEARLES,
Solicitors for Plaintiff.

HENRY F. CRANE. *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
City and County of San Francisco, }

Josiah S. Smith, being duly sworn, deposes and says: that he is the plaintiff named in the foregoing amended complaint; that he has read the contents thereof; that the same is true of his own knowledge and belief, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

JOSIAH S. SMITH.

Subscribed and sworn to before me this first day of May, 1895.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Copy of within received this first day of May, 1895, receipt without waiving rights pl'ff may have to object to its being filed at this date. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed May 1st, 1895. W. J. Costigan, clerk.

11 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant, }
vs.
JOSEPH NAPHTALY, Defendant. }

Demurrer to Amended Complaint.

This defendant, Joseph Naphtaly, by protestation, not confessing all or any of the matters or things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth and alleged, does demur to said bill and for cause of demurrer shows:

I.

That the said complainant hath not by his said bill of complaint made such a case as entitles him in a court of equity to any relief from or against this defendant.

II.

That it appears upon the face of the said bill that the complainant was not and never has been in the *bona fide* actual possession of the lands and premises which constitute the subject-matter of this action or any part thereof.

And for further cause of demurrer, this defendant alleges that this court has no jurisdiction of the subject-matter of the action.

Wherefore, and for divers other good causes of demurrer
12 appearing in the said bill, this defendant doth demur thereto, and prays the judgment of this honorable court, whether he shall be compelled to make any other and further answer to the

said bill, and humbly prays to be dismissed from hence with his reasonable costs in this behalf sustained.

NAPHTALY, FREIDENRICH & ACKERMAN,
Solicitors for Defendant.

A. L. RHODES AND
CRITTENDEN THORNTON,
Of Counsel for Defendant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

A. L. RHODES,
Counsel for Defendant.

UNITED STATES OF AMERICA,
City and County of San Francisco, } ss:

Joseph Naphtaly, the above-named defendant, being duly sworn, upon his oath doth say that the foregoing demurrer is not interposed for delay.

J. NAPHTALY.

Subscribed and sworn to before me this 8th day of May, 1895.

[SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Filed May 8th, 1895. W. J. Costigan, clerk.

13 At a stated term, to wit: the July term A. D. 1895 of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 5th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

J. S. SMITH
vs.
JOS. NAPHTALY. } No. 11887.

Order Sustaining Demurrer and Dismissing Complaint.

The demurrer to amended bill came on regularly for hearing, H. F. Crane and Philip Teare, Esqs., appearing for plaintiff and against said demurrer, and A. L. Rhodes and C. Thornton, Esqs., appearing for said defendant and in support of said demurrer, after argument of counsel duly heard and considered, it was ordered that said demurrer be, and hereby is, sustained and bill dismissed at complainant's cost.

14 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Enrollment.

The complainant filed his bill of complaint herein on the 9th day of February, 1894, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the 5th day of March, A. D. 1894, which is hereto annexed.

The respondent appeared herein on the 5th day of March, 1894, by Naphtaly, Freidenrich & Ackerman, and A. L. Rhodes and J. C. Campbell, Esqs., his solicitors.

On the 2nd day of April, 1894, an answer was filed herein, which is hereto annexed.

On the 7th day of May, 1894, a replication to the answer was filed herein, which is hereto annexed.

On the 6th day of March, 1895, a motion to amend bill of complaint was filed herein, which is hereto annexed.

On the 11th day of March, 1895, an order was made herein granting said motion to amend bill of complaint, a copy of said order being hereto annexed.

On the 11th day of March, 1895, an amended bill of complaint was filed herein, which is hereto annexed.

15 On the 12th day of March, 1895, a demurrer to the amended bill of complaint was filed herein, which is hereto annexed.

On the 22nd day of April, 1895, an order was made herein confessing the demurrer to the amended complaint, a copy of said order being hereto annexed.

On the 1st day of May, 1895, an amended complaint was filed herein, which is hereto annexed.

On the 8th day of May, 1895, a demurrer to said amended complaint was filed herein, which is hereto annexed.

On the 5th day of August, 1895, an order was made herein sustaining the demurrer to the amended complaint and dismissing the cause, a copy of said order being hereto annexed.

Thereafter a final decree was signed, filed and entered herein in the words and figures following, to wit:

16 At a stated term, to wit: the July term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Final Decree.

In this cause an order having been heretofore on the 5th day of August, 1895, made and entered herein sustaining the demurrer of the respondent to the amended bill of complaint of complainant and dismissing said cause at complainant's cost—

Thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the complainant's amended bill of complaint herein be, and the same hereby is dismissed, and that respondent recover his costs herein taxed at $—.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed and entered August 19, 1895. W. J. Costigan, clerk.

17 In the Circuit Court of the United States, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Petition for Order Allowing Appeal.

Josiah S. Smith, the plaintiff in this suit, feeling himself aggrieved by the judgment and decree of this court entered herein on the 19th day of August, 1895, whereby it was ordered and adjudged that the demurrer of the defendant to his amended complaint herein be sustained and that said complaint be dismissed with costs—

Now comes the plaintiff by his counsel, H. F. Crane and Philip Teare, and prays said court for an order allowing him an appeal to the hon., the United States circuit court of appeals for the ninth circuit under and in accordance with the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the bond as security for costs, etc., on said appeal.

Dated August, 1895.

H. F. CRANE AND
PHILIP TEARE,
Plaintiff's Attorneys.

(Endorsed:) Filed August 21, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

18 In the Circuit Court of the United States, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Plaintiff's Assignment of Errors on Appeal.

1st.

The court erred in holding and deciding that the plaintiff was not entitled to have and maintain this suit, under and by virtue of section 738 of the Code of Civil Procedure of the State of California, against one who claims an estate or interest in real property adverse to him, for the purpose of having such adverse claim determined.

2nd.

The court erred in holding and deciding that it appeared upon the face of the complaint, or at all, that the plaintiff has a plain, adequate and complete remedy at law.

3rd.

The court erred in holding and deciding that the facts set forth in the amended bill of complaint failed to show, that the patent issued by the Land Department to the plaintiff, for the land in question, was so issued without authority of law and was therefore void.

4th.

19 The court erred in holding and deciding that the plaintiff had no such interest in the land in controversy, or the subject-matter of the suit, as to entitle him to question the validity of said patent, or the acts of the officers of the Land Department of the United States in issuing or causing said patent to be issued to the defendant.

5th.

The court erred in holding and deciding that the officers of the Land Department had the sole power to adjudge and determine each and all questions relating to the legal construction of the provisions of the 7th section of the act of Congress entitled "An act to quiet land titles in California," approved July 23rd, 1866, and that their construction is final and binding on all the courts.

6th.

The court erred in holding and deciding that the Hon. John W. Noble, as Secretary of the Interior, and the successor in that office of the Hon. W. F. Vilas, had authority to order a rehearing of the defendant's application to purchase said land, and upon such re-

hearing to reverse the final decision and action of a former Secretary, and the entire former Land Department and grant said application.

7th.

The court erred in sustaining the defendant's demurrer to the amended bill of complaint and in ordering said complaint to be dismissed.

H. F. CRANE AND
PHILIP TEARE,
Pl'ff's Att'ys.

(Endorsed:) Filed August 21, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

20 At a stated term, to wit: the July term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 21st day of August, in the year of — Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOSIAH S. SMITH
vs.
JOSEPH NAPHTALY. } No. 11887.

Order Allowing an Appeal.

Upon motion of H. F. Crane, Esq., counsel for complainant, and upon filing a petition for an order allowing an appeal, and an assignment of errors, it is ordered that an appeal be, and hereby is allowed to the United States circuit court of appeals for the ninth circuit herein, from the final decree filed and entered herein August 19th, 1895, and that the amount of the bond on appeal be, and hereby is fixed at the sum of five hundred dollars.

Bond on Appeal.

Know all men by these presents, that we, Josiah S. Smith, as principal, and W. A. Rogers and D. P. Smith, as sureties, are held and firmly bound unto Joseph Naphtaly, in the full and just
21 sum of five hundred dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a circuit court of the United States, for the northern district of California, in a suit depending in said court between Josiah S. Smith, complainant and appellant, and Joseph

Naphtaly, respondent and appellee, numbered 11887, a decree was rendered against the said appellant and the said Josiah S. Smith, having obtained from said court an order allowing an appeal, to reverse the decree in the aforesaid suit and is about to obtain a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at the United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California, on the 2d day of September next:

Now, the condition of the above obligation is such, that if the said Josiah S. Smith shall prosecute his said appeal to affect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSIAH S. SMITH. [SEAL.]
W. A. ROGERS. [SEAL.]
D. P. SMITH. [SEAL.]

22 Acknowledged before me the day and year first above written.

[SEAL.] J. M. STOW,
Notary Public in and for Contra Costa County, Cala.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

W. A. Rogers and D. P. Smith, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

W. A. ROGERS.
D. P. SMITH.

Subscribed and sworn to before me, this 24 day of August, A. D. 1895.

[SEAL.] J. M. STOW,
Notary Public in and for the County of Contra Costa, State of California.

(Endorsed:) The sureties in the foregoing bond are in my judgment good and sufficient for the amount of such bond. Jos. P. Jones, judge. Form of bond and sufficiency of securities approved. Joseph McKenna, judge. Filed Aug. 28th, 1895. W. J. Costigan, clerk.

23 In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Certificate to Transcript.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern

district of California, do hereby certify *that* the foregoing pages, numbered from 1 to 22 inclusive, to be full, true and correct copies of the amended complaint filed May 1, 1895; demurrer, filed May 8, 1895; order of court of August 5, 1895; enrollment, final decree, petition for appeal, assignment of errors, order allowing appeal, and bond on appeal in the therein-entitled cause, as the same remain of record and on file in the office of the clerk of said court.

I further certify that the cost of the foregoing copies is $15.90, and that said amount was paid by Josiah S. Smith, appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 27th day of Sept., A. D. 1895.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

24 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 27th day of September next, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States, for the northern district of California, in that certain action numbered 11887, in which Josiah S. Smith is complainant and appellant and you are defendant and appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, judge of the United States circuit court, in and for the northern district of California, this 28th day of August, A. D. 1895.

JOSEPH McKENNA,
Judge of the U. S. Circuit Court, Northern District of California.

Received a copy of the within citation this twenty-eighth day of August, 1895.

J. NAPHTALY,
Defendant, in Person.

25 (Endorsed): Original. U. S. circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Citation. Filed August 28, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

(Endorsed): No. 262. United States circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Transcript of record. Appeal from the circuit court of the United States for the northern district of California. Filed September 27, 1895. F. D. Monckton, clerk.

26 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY *et al.*, Appellees.

Appeal from the circuit court of the United States for the northern district of California.

Before Gilbert and Ross, circuit judges, and Morrow, district judge.

Ross, circuit judge, delivered the opinion of the court:

From the action of the court below in sustaining a demurrer to the bill in this case the complainant appealed. The merits of the case are covered by the decision in the case of Beley *et als. vs.* Naphtaly, just filed. It is not necessary to do more than to refer to the reasons there given in support of our judgment affirming that of the court below.

Judgment affirmed.

(Endorsed): Opinion. Filed Feb. 3, 1896. F. D. Monckton, clerk.

27 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY. } No. 262.

Appeal from the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed Feb. 3, 1896. F. D. Monckton, clerk.

28 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the sixth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William W. Morrow, district judge.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY. } No. 262.

On motion of H. F. Crane, Esquire, counsel for the appellant, Crittenden Thornton, Esquire, counsel for the appellee, consenting,

it is ordered that an appeal to the Supreme Court of the United States herein be, and the same is hereby, allowed.

On like motion and consent it is further ordered that the amount of the bond for costs on appeal to said Supreme Court be, and the same is hereby, fixed at the sum of five hundred dollars.

29 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY, Appellee. } No. 262.

Assignments of Error in Supreme Court.

1st. The court erred in holding that the appellant as against the appellee was and is a naked trespasser on the land because it did not appear that the appellant had connected himself with any title from the United States thereto.

2nd. The court erred in holding that because the appellant was unable to connect himself with the title of the United States he could not be permitted to show that the patents mentioned in the bill were issued without authority of law and were therefore void.

3rd. The court erred in holding that after the Commissioner of the General Land Office and the Secretary of the Interior had heard, tried, and finally determined the right of the appellee to purchase said land under the 7th section of the act of July 23rd, 1866, that such determination was not final, and that a succeeding Secretary had the power and right to reopen said matter and permit such purchase by the appellee under said act after it had been rejected by said former determination.

4th. The court erred in assuming that said 3,000 acres of land or any part thereof had ever been enclosed in any manner or ever had any ascertained boundary lines or any boundaries whatever.

30 5th. The court erred in assuming and holding that the right conferred by section 7, act of July 23d, 1866, could not be made available until the United States public surveys had been made and run on said land.

6th. The court erred in assuming and holding that S. P. Millett was in October, 1859, or at any time a purchaser of said land in good faith under said statute or for a valuable consideration or was such a purchaser as is contemplated by said statute and that he became entitled to make such purchase thereunder.

7th. The court erred in holding that the appellee, by becoming a remote purchaser of an indefinite and undescribed tract of public land in May, 1876, from said Millett by simple mesne conveyance, thereby acquired a right in 1883 to cause 3,000 acres of the public land in Contra Costa county, California, to be surveyed and platted and to purchase the same from the United States.

8th. The court erred in holding that the appellee was a person who had in good faith and for a valuable consideration purchased

said land of a Mexican grantee or assigns, which grant had subsequently been rejected, and had used, improved, and continued in the actual possession of the same according to the lines of his original purchase.

9th. The court erred in holding in effect that the decision of Secretary Noble in allowing and permitting such purchase by the appellee was and is conclusive upon the appellant upon all questions of law and fact.

10th. The court erred in holding said sale and the patents issued to the appellee in pursuance thereof to be legal and valid and to pass the title of said land to the appellee and erred in sustaining the demurrer to the bill and dismissing the same.

31 Wherefore appellant prays that the decree of the U. S. circuit court of appeals be reversed and the cause be remanded with direction that the demurrer be overruled and a new trial ordered in the circuit court.

H. F. CRANE,
Of Counsel for Appellant.

(Endorsed:) Assignment of errors. Filed May 8th, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

32 Know all men by these presents that we, Josiah S. Smith, as principal, and David P. Smith and Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of five hundred dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the United States circuit court of appeals for the ninth circuit, in a suit depending in said court between Josiah S. Smith, appellant, and Joseph Naphtaly, appellee, a decree was rendered against the said appellant, and the said appellant having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at the United States Supreme Court to be holden at the city of Washington, District of Columbia, within sixty days from the date hereof, being about to issue:

Now, the condition of the above obligation is such that if the said Josiah S. Smith shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

D. P. SMITH. [SEAL.]
MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

33 UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

David P. Smith and Marie C. Tackley, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

D. P. SMITH.
MARIE C. TACKLEY.

Subscribed and sworn to before me this 21st day of April, A. D. 1896.

F. D. MONCKTON,
Commissioner of U. S. Circuit Court,
Northern District of California.

(Endorsed:) Bond on appeal. Form of bond and sufficiency of securities approved. Joseph McKenna, judge. Filed April 21, 1896. F. D. Monckton, clerk.

34 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY, Appellee. } No. 262.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-two pages, numbered from one to thirty-two, both inclusive, to be a full, true, and correct copy of the printed transcript of record and of all proceedings in our said United States circuit court of appeals, and that the same together constitute the entire transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 9th day of May, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Supreme Court, to be holden at the city of Washington, District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal entered in the

clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Josiah S. Smith is appellant and you are appellee, and to show cause, if any there be, why the decree rendered against the said Josiah S. Smith, as in the said *decree* mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, judge of the United States circuit court in & for the northern district of California, 9th circuit, this 22d day of April, A. D. 1896.

JOSEPH McKENNA,
U. S. Circuit Judge, 9th Circuit.

36 [Endorsed:] Dock. —, No. 262. U. S. circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Citation. Filed April 22, 1896. F. D. Monckton, clerk.

On the 22d day of April, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared before me, the undersigned, W. J. Costigan, Philip Pease, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly, appellee, on the 22d of April, A. D. 1896.

PHILIP PEASE.

Sworn to and subscribed the 22d day of April, A. D. 1896.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Endorsed on cover: Case No. 16,304. U. S. circuit court of appeals, 9th circuit. Term No., 181. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, Filed May 20, 1896.

Cts. 180 & 181.

Brief of Crane for P. in Err. & Appt.

Filed Dec. 6, 1897.

Supreme Court of the United States

Nos. 180, 181

JULIUS A. BRLEY, ET AL., *Plaintiffs in Error,* vs. JOSEPH NAPETALY, *Defendant in Error.* No. 180.	JOSIAH S. SMITH, *Appellant,* vs. JOSEPH NAPETALY, *Appellee.* No. 181.

Brief of Plaintiffs in Error and Appellant

HENRY F. CRANE,
For Plaintiffs in Error and Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JULIUS A. BELEY, ET AL., *Plaintiffs in Error,* vs. JOSEPH NAPHTALY, *Defendant in Error.* No. 180.	JOSIAH S. SMITH, *Appellant,* vs. JOSEPH NAPHTALY, *Appellee.* No. 181.

The leading question in the above cases, being the same, will be presented and submitted upon this brief in case No. 180.

STATEMENT OF FACTS.

This was an action by the defendant in error, against Julius A. Beley and twenty others, plaintiffs in error, commenced in the Circuit Court of the United States, Ninth Circuit, Northern District of

California, to recover possession of certain land situate in the county of Contra Costa, California, described in the complaint.

The defendant in error, for recovery against the plaintiffs in error, relied solely upon what purported to be two United States patents, dated February 28, 1893, one calling for 371.40 acres, the other for 566.16 acres of land (pp. 11 and 12 Rec.) purporting to grant the land to defendant in error.

The plaintiffs in error contend that the sales and entries by certain officers of the Land Department of these lands were void because the purported sales upon which the patents issued were not authorized by law, and hence that said patents are void, and pass no title to the defendant in error.

No reference is made, on the face of the patents, to any act of Congress, or law authorizing the sale of the land or the issuance of the patents, but the application of defendant in error to purchase (p. 13, fol. 24 Rec.) shows, that the sale was made and the patents issued under color of the provisions of Section 7, Act of Congress, entitled "An act to quiet land titles in California," approved July 23, 1866.

14 *U. S. Stat. at Large*, 218, or 2 *Lester's Land Laws*, p. 182.

The provisions of said Section 7, so far as affecting this contention, are as follows, viz:

"*Section 7. That where persons in good faith and for a valuable consideration, have purchased lands of*

*Mexican grantees or assigns which grants have been subsequently rejected . * * * and have used, improved and continued in the actual possession of the same, as according to the lines of their original purchase * * * such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section under regulations to be provided by the Commissioner of the General Land Office," etc.*

The defendant in error, upon the question of title, introduced in evidence on the trial the patents before mentioned, relying solely upon said patents as proof of his title to the lands in controversy.

For the purpose of showing that said patents were issued without authority of law the plaintiffs in error offered in evidence the following testimony:

1st. The verified application of defendant in error to purchase the land embraced in these patents from the United States, and other land; this document was sworn to and filed in the United States Land Office at San Francisco, August 10, 1883.

It is printed in full in the transcript, p. 13, fol. 24, to p. 15, and will be referred to for particulars.

Among other facts stated in this application is that one Inocencio Romero occupied the land in controversy from 1844 to December, 1853.

It is further alleged that said land formed part of a grant, made by the Mexican government in the year

1844 to Inocencio Romero and his two brothers, and that such grant or claim was afterward rejected.

For purposes of convenience we have here tabulated the statement as found in the application relative to conveyances from Romero, the *assumed* Mexican grantee, to his grantees in line, to defendant in error.

Inocencio Romero to Domingo Jujal et al	Dec. 26, 1853
Domingo Jujal et al to J. W. Tice	Feb. 14, 1855
J. W. Tice to A. J. Tice	Aug. 8, 1855
A. J. Tice to S. P. Millett	Oct. 15, 1859
S. P. Millett to D. P. Smith	1868
D. P. Smith to J. R. Spring	Feb. 1869
J. R. Spring to Martin Clark	Mch. 1869
Martin Clark to defendant in error	May 15, 1876

2d. The plaintiffs in error next offer in evidence the record of the Romero claim as the same appears upon the Mexican archives in the office of the Surveyor General in San Francisco. It is printed in full in transcript p. 15, folio 28 to p. 17, folio 31, for particulars see entire Mexican record above referred to. It shows simply an *attempt* to procure a grant from the Mexican Governor between January 18th and March 23d, 1844, of the land in controversy, which attempt appears to have been abandoned and no grant was ever issued by the Mexican Governor, as this record will fully show.

3d. The plaintiffs in error next offered in evidence the decision and judgment of the Board of Land Commissioners in the matter of said Romero claim on proceedings for confirmation thereof, presented February 28, 1853, (Vol. 8, Dec. Dept. Int. 147, bottom).

On April 17, 1855, the board decided "*that it does not appear that any grant was ever issued to any person*

and no equitable right appears on the part of any of the petitioners." Claim is rejected. (Rec., p. 17, folio 32).

4th. The plaintiffs in error next offered in evidence the decision and judgment of the U. S. District Court in the Romero case as reported in full in *1 Hoffman's Reps.*, 219, entitled *United States vs. Romero, et al.*

On October 5, 1857, the Court held and decided "*that no grant, either perfect or inchoate, was ever made, nor any promise given that one should be made.*" Claim rejected on that ground alone. See Rec., p. 18, 1 Hoffman Rep., 219.

5th. The plaintiffs in error next offered in evidence the decision and judgment of the U. S. Supreme Court, December term, 1863, on appeal in said cause, showing that the said judgment of the District Court was by the Supreme Court affirmed. *U. S. vs. Romero, et al.*, 1 Wall, 729, Rec., folio 33.

6th. The plaintiffs in error next offered in evidence the decision of William A. J. Sparks, Commissioner of the General Land Office, upon the matter of the application of defendant in error to purchase said land, whereby the commissioner holds that in view of the decisions of the Courts to the effect that no grant ever issued and no equitable right appears on the part of the petitioners and claimants, it must follow conclusively that the act of July 23, 1866, has no relevancy to the case in hand.

The entire opinion is printed in the record, commencing at bottom p. 18, ending folio 36, p. 20, dated March 2, 1887.

7th. The plaintiffs in error also offered in evi-

dence the opinion and decision of Hon. W. F. Vilas, Secretary of the Interior, of the United States, on appeal from said decision of the Commissioner of the General Land Office, wherein he affirms the decision of the Commissioner.

Reported in full, Vol. 8, Dec. of the Dept. of the Int., p. 144, *et seq.*

8th. The plaintiffs in error also offered in evidence the opinion of the Acting Secretary, Chandler, on motion for a review and reconsideration of said case, which motion was granted June 23, 1891.

Vol. 12, Dec. of Dept. of Int., p. 667.

9th. The plaintiffs in error also offered in evidence the opinion of Hon. John W. Noble, Secretary of the Interior, and successor in office to said Hon. W. F. Vilas, whereby the application of defendant in error to purchase said land was granted on the 18th day of May, 1892. See opinion in full Vol. 14, Dec. of Dept. of Int., p. 536. See also Rec., p. 20, fols. 36 to 37.

The defendant in error by his counsel then and there objected to the introduction of each and every of such records and documents in evidence on the ground that the same were immaterial, incompetent and irrelevant for the purpose of affecting the validity of said patents.

The Court sustained such objection, to which ruling the plaintiffs in error by their counsel then and there excepted. Rec. folio 37, p. 20.

The plaintiffs in error here rested, and the Court ordered judgment in favor of defendant in error in accordance with the prayer of the complaint.

A motion for a new trial was made, based upon a settled bill of exceptions (pp. 9 to 11, Rec.) Motion for new trial denied February term, 1895.

It will be seen that no question of fact is in issue in this case; it rests upon record and documentary evidence, all of which was before the Land Department. The case calls for a conclusion of law upon facts admitted.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that a person could become entitled to purchase public land of the United States under the provisions of the seventh section of the Act of Congress of July 23, 1866, where no grant or semblance of a grant had ever issued from the Mexican Government to any person for said land, or any part thereof.

II.

The Court erred in holding that a person could be a purchaser in good faith under said seventh section of said statute where the records of the Mexican government relative to such claim failed to show that any grant or semblance of a grant had ever issued to any person.

III.

The Court erred in holding that a person could be deemed in law a purchaser in good faith under said statute where for more than two years prior to said

purchase the United States District Court had adjudged that no grant had ever issued, and where such judgment was in full force at the time of such purchase and has since continued to so remain in full force.

IV.

The Court erred in holding that defendant in error was a person who did on the 15th day of May, 1876, or any time, purchase in good faith said land of a Mexican grantee or his assigns, which grant had been subsequently rejected.

V.

The Court erred in holding that S. P. Millett was, on the 17th day of October, 1859, a person who had in good faith purchased said land of a Mexican grantee or his assigns, which grant had been subsequently rejected.

VI.

The Court erred in holding that after the defendant in error had been given a full and fair hearing upon his application to purchase said land by and before the proper officers of the Land Department, to-wit: the Commissioner of the General Land Office and the Secretary of the Interior, and where both of said officers had agreed in refusing and denying such right, that such decision was not final in the Land Department.

VII.

The Court erred in holding that a succeeding

secretary has the power to order in such a case as the foregoing a review and reconsideration of said case, and upon such review and reconsideration to ignore or reverse the decision of his predecessor, decide said case contrary to the former decision of the Department, reverse said decision, and grant the application of the defendant in error.

VIII.

The Court erred in assuming that said land (embracing about 3,000 acres in all) or any part thereof, has ever been enclosed in any manner, or has ever been surveyed, or has ever had any known or ascertained boundaries, or has ever been other than a mere settler's possessory claim.

IX.

The Court erred in holding that the right of purchase provided by said seventh section could not be made available until the public surveys had been extended over the land, and also in ignoring the provision of Section 7 of the statute which requires the purchaser to procure his claim to be officially surveyed like any private claim as a condition precedent to the right of purchase from the United States under said seventh section.

X.

The Court erred in assuming that plaintiffs in error as against the defendant in error (charged with holding under a void title) were confessedly naked trespassers on the land, because they could not con-

nect themselves with the title of the United States either by certificate of purchase, patent or anything of the kind.

XI.

The Court erred in holding that the evidence offered by the plaintiffs in error was immaterial, incompetent or irrelevant for the purpose of effecting the validity of said patents, and in sustaining the objection of defendant in error to said evidence.

ARGUMENT.

I.

By the terms of the seventh section, act of July, 23, 1866, persons who have purchased lands of supposed Mexican grantees or assigns must be deemed chargeable with notice whether or not said pretended grantees or assigns held the land under a Mexican grant or some semblance of one at the time of such purchase.

The purchase must be from a Mexican grantee or his assigns. It must be some semblance of a Mexican grant showing on its face a *prima facie* transfer of title to said Mexican grantee; such grant must have been rejected after the purchase mentioned in the statute.

The terms of the statute are not ambiguous; they require no construction, they are plain on their face; they have relation alone to persons who have in good

faith purchased land from Mexican grantees. The statute has no relation to cases where persons have purchased land of those who were not Mexican grantees.

It seems to have been the intent of Congress that these favored purchasers should have made their purchases from those who had some color of title, nothing short of a grant would show color of title under the Mexican system; many of these titles were rejected by reason of the failure to comply with some requirement of the Mexican statutes not appearing upon the grant. As matter of fact the Romeros had no color of title other than such as is implied from mere possession. Section 7 deals only with Mexican grantees which grants have been rejected.

It is presumption for a grantee of Romero to attempt to set up and indulge in speculations whether Romero may not have had a grant; no attempt seems to have been made to prove the fact in the Land Department. On the other hand, it was assumed that no grant ever existed.

This issue was tendered before the Commission, the United States District and Supreme Courts, and each adjudged that no grant had ever issued. That matter has been conclusively settled for over forty years as to Romero and his grantees.

The Romeros had no claim to present for confirmation. By act of March 3, 1851, having relation to the settlement of land claims in California, section 8 (1 Lester L. L., p. 176) the statute defines the status of claimants and the kinds of claims to be presented, viz: "*Every person claiming lands in California by virtue of any right or title derived from the Mexican*

* * * *government*" shall present the same, etc. Hence they had no such claim to present.

Since the rejection of the claim by the Commission, April 17, 1855, and the United States District Court, October 5, 1857, on the sole ground that no grant had issued, and those judgments still standing in full force and effect, there is no more room for speculation about the grant to Romero. From and after the latter date it became a mere possessory claim or range for cattle, and it stands virtually confessed on the record that the Hon. John W. Noble in May, 1892, permitted the defendant in error to purchase 3,000 acres of public land in Contra Costa county, California, being a portion of a possessory claim, all by virtue of the provisions of the seventh section, act of July 23, 1866. The statute did not authorize the act, and hence it was and is void.

II.

The statute further requires that the person shall have made his purchase from the Mexican grantee in good faith.

It has been held that a purchaser in good faith, within the meaning of this seventh section, is one who purchases in the sincere and fair belief that he is acquiring a good title to the land purchased and is chargeable with no notice of defects in that title, which may operate to defeat it, and especially one who is not chargeable with notice that he is purchasing only a speculative title.

Vol. 8, Decis. Dept. Int., p. 148.

The defendant in error made his purchase from a remote grantee of Romero, May 15, 1876, that was over twenty years after the claim had been rejected by the commission, and about eighteen years after it had been rejected by the United States District Court. It is conceded that *he* was not a purchaser in good faith, but in the court below he claimed the right to rely upon the purchase of S. P. Millett who made his purchase October 17, 1859. In 1868 he made a conveyance of the land to D. P. Smith (folio 26, p. 14). Smith conveyed to Spring and Spring conveyed to Clark and he conveyed to defendant in error.

If Millett acquired the right to purchase from the Government it was a mere personal right, not running with the land, and a mere conveyance of the land would not pass such right to the purchaser.

But Millett was not a purchaser in good faith. We have shown that the Romero claim was rejected by the Commission in 1855, and by the United States District Court on October 5, 1857. Millett purchased on October 17, 1859, two years after the judgment of the District Court had been of record. By that judgment not a shred of Mexican title remained, and the Romero claim was rejected. Millett purchased when affairs were in that condition. All he acquired was a rejected claim never granted by the Mexican government, and rejected for that reason alone.

In fact all he got was the possession of the tract of land, the right to conduct an appeal pending therein from the above judgment resulting in the affirmance of the judgment. Under all these circumstances Millett must be presumed to have known the condition of the title he was buying. Nothing is said in

the record in reference to the purchase being in good faith or for any consideration. The fact was, his purchase was a gamble on the decision of the Supreme Court, a pure speculation, and a bad one. It is conceded that none of the grantees from Romero prior to Millett's purchase ever acquired any interest under the seventh section, act of July 23, 1866, for the simple reason that each of them parted with all his interest in said claim before the passage of the act of July 23, 1866. Millett held possession until 1868, never claiming any right to purchase the land from the United States; he virtually purchased a lawsuit; he could not have purchased in the sincere and fair belief that he was acquiring any title under a Mexican grant. He knew the two judgments standing on record utterly defeated the Mexican title, and that such title was in imminent peril by the affirmance of the judgment of the District Court. The records of the Mexican government, the decree of the Land Commission, and the judgment of the United States District Court each showed that no grant ever issued for this claim. After July 23, 1866, it is quite significant that seventeen years elapsed before any move was made to purchase this land from the United States, and upon the theory of defendant in error there were five purchasers in that period who could have done so.

III.

We submit that the purchase from the United States provided for by the seventh section, act of July 23, 1866, has relation to the purchase of a definite tract and not an undivided interest.

The deed given by Romero to Domingo Pajole, et al., dated December 26, 1853, upon which all subsequent deeds are made, calls for *all the undivided one-third* of the land contained in the Romero claim. All subsequent conveyances call for the same undivided interest.

See 8 Decis. Dept. Int., 149 and 151.

We submit that the statute does not contemplate the purchase of an undivided interest, it relates alone to a definite tract, susceptible of being used, improved and held in several and actual possession by the purchaser according to the lines of his original purchase. It also requires him to have the same surveyed before he makes application to purchase.

Several of the most important requirements of the statute could not be performed in case of a sale of an undivided interest. In fact this Romero range, and none of it, has ever been surveyed. It has never been fenced except on paper (see diagram between pp. 14 and 15); it has never had any known or ascertained boundaries. Defendant in error did not apply to purchase until the public surveys were run over the tract at the expense of the United States. He then makes application for sections, quarter-sections and fractional sections. Assuming that he

has a roving commission to select and take tracts as please him, this is of itself a plain violation of Section 7, act of 1866, and an open and manifest fraud upon the rights of *bona fide* settlers. The act of July 23, 1866, makes it mandatory and a condition precedent to the purchase itself, that the purchaser shall have the lands surveyed under existing laws; this survey must precede the purchase that the land offices may keep the account on the town plats like any other private claim.

We submit that the seventh section, act of 1866, does not authorize purchasers of undivided interests in Mexican claims to purchase such lands from the United States, and by the terms and material requirements of the seventh section it would seem plain that such purchases must be excluded; upon the rejection, the land becomes public land. How is this purchaser of an undivided interest to show that he has used, improved and continued in the actual possession, according to the lines of his original purchase? How is such interest to be segregated from the entire tract?

IV.

We have in this case the decision of one Land Deparment to a finish and completion. Then an order to review and reconsider by certain successors in office, and upon a review and reconsideration of the same case an adverse decision.

We submit that the first decision is sound and the second unsound.

This matter came regularly before the Commissioner of the General Land Office some time prior to March 2, 1882, for a hearing and decision, and on that date, after a full hearing the Commissioner found and decided (following the decisions of the Courts and other records) that no grant or semblance of a grant ever issued for the Romero claim, that Romero had no right or title derived from the Mexican government, and hence the act of July 23, 1866, Section 7, had no relevancy to the case, and the right of defendant in error to purchase be denied.

This decided as a question of law that the officers of the Land Department had no authority to sell said land under Section 7, to the defendant in error.

The Commissioner also decided that the statute only applies to persons who purchased prior to the rejection of the supposed grant or claim. As to the latter point see Vol. 8 Dec. of Dept. Int., p. 145, bottom.

On an appeal from the above decision the Honorable Secretary of the Interior, W. F. Vilas, on the 4th day of February, 1889, after a full and careful consideration of the case, affirmed the decision of the Commissioner. This ended the case before the Department; there was nothing more to be done; it was a final decision of the Department.

See Opinion of Secretary Vilas, Vol. 8, Decis. Dep. Int., 144.

The Department rejected the application of defendant in error on the following grounds:

1st. Because Romero never had a Mexican grant, or any claim or title derived from the Mexican Government.

2d. That the purchase was not made until after the claim had been rejected.

3d. That the purchase was not made in good faith, but was merely a speculative purchase.

On motion for review Mr. Assistant Secretary Chandler disposes of points first and second by saying that Secretary Vilas overruled the Commissioner on these points; that would not dispose of the question if true, but it is not true. Mr. Secretary Vilas says that he is not prepared to place his decision on that ground alone, but is disposed to place his affirmance of the Commissioner's decision upon other grounds in respect to which the fact finally decided by the Supreme Court is of consequence as a matter of evidence upon the question of good faith.

Vol. 8, Dec. Dept. Int., p. 148.

The Assistant Secretary labors to show that the Romeros made a parol partition of the claim, and asserts that in his opinion they did. In my opinion they did not, but it is not very material.

Afterwards he says: "but the question to be determined at this time is, did Romero sell a tract of land definite and specific as to boundaries?" He settles this question as follows, viz: "In my opinion the answer to this question must be in the affirmative."

Vol. 12, Dec. Dept. Int., p. 672.

We call attention to the deed itself (Vol. 8, Dec. Dep. Int., p. 149) calling for "*all the undivided one-third* of the lands and ranchos in Contra Costa county," etc.

It is quite clear that Assistant Secretary Chandler had some anxiety to decide this case in a certain way.

On May 18, 1892, Secretary Noble gave a second opinion, in which he devotes eight pages to the question whether a deed made to one Urhetta Tice was made for a valuable consideration or not.

Vol. 14, Dec. Dept. Int., p. 536.

We are not in a position on this question of good or valuable consideration to comment, because the defendant in error has not placed this lady in the line of his grantors.

The points in the case which are adverse to defendant in error, and which defeat him, were by these latter gentlemen ignored and smothered with indifference and neglect.

We submit that the decision of Secretary Noble and his assistant presents this anomaly, viz: that a person by virtue of having purchased a stock range in California of about 3,000 acres out of the public lands of the United States, acquiring no title thereby except possession, has by such purchase and the provisions of the seventh section of the act of July 23, 1866, become entitled to purchase the same land of the United States at $1.25 per acre, and have issued to him U. S. patents therefor.

V.

On the trial it was conceded by counsel for defendants that they did not propose to connect themselves with the title of the United States to the premises described in the complaint, either by certificate of purchase, patent, or anything of the kind.

(Record, p. 13, top.)

This concession was asked of us by the defendant in error, and conceded in the terms he asked it.

Upon this alone the Court asserted in its opinion that these persons are all naked trespassers (p. 30, fol. 55, at bottom, also page 37 last paragraph) and as to them these patents are conclusive, the defendants being bare intruders. We deny that the admission was more than a concession that they could not so connect themselves by any kind of paper title.

We submit this is not a confession that they were naked trespassers or bare intruders upon public land subject to settlement and disposal under the laws.

Should this Court desire to know the status of the most of the defendants in the Court below, let them read the complaint in *Smith vs. Naphtaly*, No. 181, as a part of this brief.

The only grounds of objection to the introduction of each of the above documents in evidence were general, viz: that it was *immaterial, incompetent and irrelevant* for the purpose of effecting the validity of said patents. Record, p. 20, folio 37.

There was no objection in the Circuit Court on the ground of the status of the defendants, and the point cannot be made on appeal for the first time.

Non constat these defendants may be in possession as pre-emption or homestead settlers having some inchoate claim something less than a paper title.

But the cases show that mere possession is sufficient to enable a defendant to attack a patent by showing that it was issued without authority of law.

In *Patterson vs. Winn*, 11 *Wheaton* 384, by the Court: "We assume it as the settled doctrine of this Court that if a patent is absolutely void upon its face, or

the issuing thereof was without authority, it may be impeached collaterally in a court of law in an action of ejectment."

Polk's Lessees vs. Wendal, 9 *Cranch*, 99.
Wilson vs. Jackson, 13 *Peters*, 509 to 511.

Held that where an officer of the Land Department attempts to dispose of land not embraced by the provisions of the law he acts without jurisdiction.

Best vs. Polk, 18 *Wall*, 112.
Smelting Co. vs. Kemp, 104 *U. S.*, 644 and 645.

It is said: "A patent may be collaterally impeached in any action and its operation defeated by showing that the Department had no jurisdiction to dispose of the land, that is that the law did not provide for selling the same."

Steele vs. Smelting Co., 106 *U. S.*, 452 and 453.

If no legislation authorized their sale * * * the patent would be inoperative to pass the title, and objection could be taken to it on these grounds at any time and in any form of action. *Reynolds vs. Iron Silver M. Co.*, 116 *U. S.*, 687 and 698, Chief Justice dissenting on sole ground that defendants had no title other than possession.

Wright vs. Roseberry, 12 *U. S.*, p. 519.
Doolan vs. Carr, 125 *U. S.*, 618.
Burfenning vs. Chicago, &c. Ry., *163 U. S. 331.*

Chief Justice dissented on the ground that defendants had no claim of title in latter case.

In this case we ask the Court to determine the question of the validity of said sales and patents;

that the evidence offered on behalf of the plaintiffs in error was and is competent and relevant to show that said sales were allowed and said patents issued without authority of law, and that said patents are void, and convey no title to the defendant in error.

That the judgment of the Circuit Court be reversed and a new trial be granted.

Respectfully submitted,

HENRY F. CRANE,

Attorney for Plaintiffs in Error.

SUPPLEMENTAL BRIEF.

JOSIAH S. SMITH,
Appellant,

vs.

JOSEPH NAPHTALY,
Appellee.

No. 181.

This case proceeds upon the theory embraced by the provisions of Section 738 Code of Civil Procedure of the State of California, which is in words and figures as follows, viz:

"*Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.*"

A demurrer was sustained to the complaint on the ground that it appears upon the face thereof that the

complainant has a plain, adequate and complete remedy at law.

In this the Court erred. The Court also erred in holding that appellant had no such interest in the land as would entitle him to question the validity of the patent issued to appellee.

The Court erred in holding that this suit could not be maintained under Section 738 Code Civil Procedure, California.

The appellant shows such an interest in the land as will entitle him to maintain this action. (Rec. pp. 1 to 5).

Shepley vs. Cowan, 91 *U. S.*, 330-338.
Ard vs. Brandon, 156 *U. S.*, 537.

This suit can be maintained under Section 738 Code of Civil Procedure of California.

Holland vs. Challen, 110 *U. S.*, 15.
Reynolds vs. Crawfordsville Bk., 112 *U. S.*, 410.
U. S. vs. Wilson, 118 *U. S.*, p. 89.
Whitehead vs. Shattuck, 138 *U. S.*, 146.

The doctrine of the last four cases is, viz: that the Federal Courts will entertain suits under such special statutes in States where adopted, except in cases where it appears that complainant has a plain, adequate and complete remedy at law.

Whitehead vs. Shattuck, *supra*.

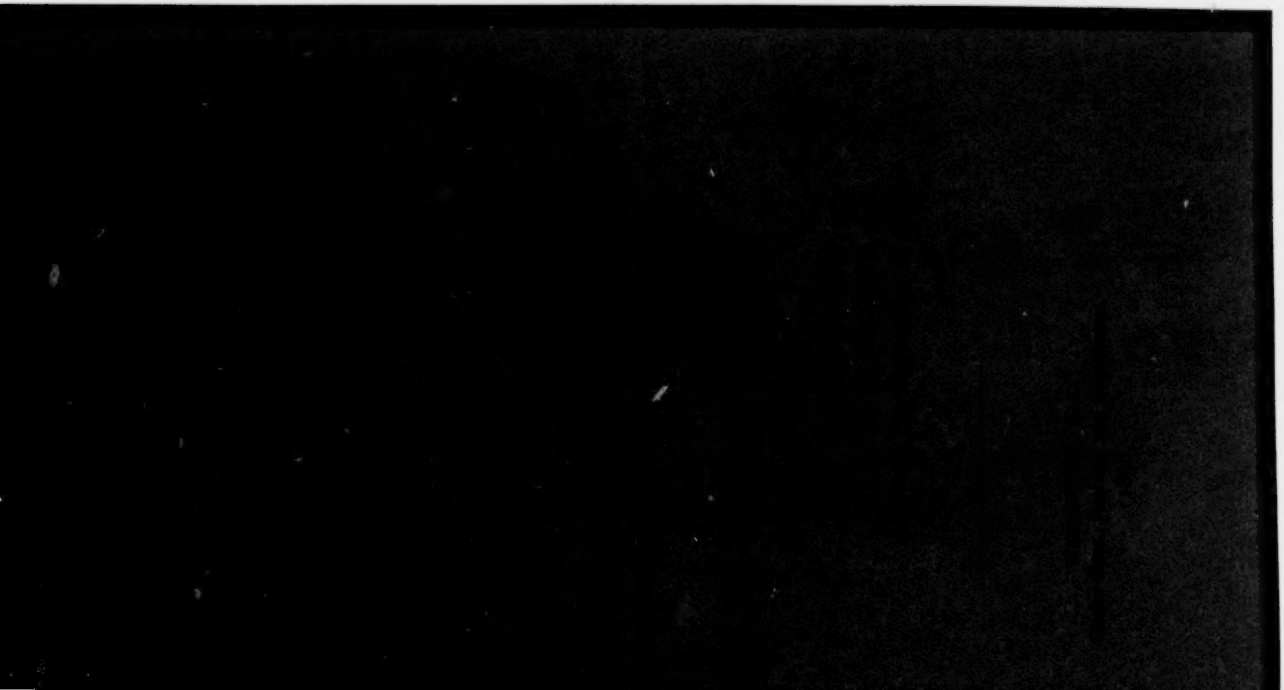
The claim of a person as a pre-emption settler under United States pre-emption laws entitles him to

maintain a suit under Section 738 to determine an adverse claim in this State.

Wilson vs. Madison, 55 Cal., 5.
Pralus vs. Pac. G. & S. M. Co., 35 Cal., 30-34.
Orr vs. Stewart, 67 Cal., 275.
Stoddard vs. Birge, 53 Cal., 18 and 399.
Coleman vs. S. R. T. R. Co., 49 Cal., 520.

We submit this case upon briefs numbered 180 and 181. If the Court should hold that said sale of land mentioned in said patents (pp. 11-12 Rec, 180) was and is a valid sale, both cases are at an end. If on the other hand said sale and patents should be adjudged invalid and void, then we ask that the judgment herein be reversed and the demurrer be overruled, and that the Circuit Court be directed to enter judgment herein in accordance with the decision of this Court and the prayer of the complaint herein, besides costs.

HENRY F. CRANE,
Attorney for Appellant.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JULIUS A. BELEY, F. DARLING, AND CHARLES BREGARD,
PLAINTIFFS IN ERROR,
v.
JOSEPH NAPHTALY.

No. 180.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This was an action at law brought in the Circuit Court of the United States in and for the Ninth Circuit and Northern District of California, by Joseph Naphtaly against Beley *et als.*, to recover the possession of certain lands in Contra Costa County, California, and also damages for the withholding thereof. The complainant alleges that Naphtaly was the owner in fee and entitled to

the possession of the controverted premises by virtue of a patent from the United States, issued to him pursuant to an approved application by him to purchase the lands under and by virtue of the seventh section of the Act of Congress of July 26, 1866 (14 Stats. 218), and that being so rightfully in possession, he was thereafter wrongfully ousted and the possession thereof wrongfully withheld by the defendants to his damage in the sum of one thousand dollars. (Rec. 1–3.)

Bregard failed to appear, and his default was entered for failure to plead.

Beley and Darling filed separate answers, denying that Naphtaly was the owner in fee of the demanded premises, or that title had vested in him by virtue of patent duly or regularly issued to him by the United States, or that they had unlawfully detained the premises from him, or to his damage. They admitted that the value of the described land and of the matter in dispute exceeded the sum of $2,000, exclusive of interest and costs. (Rec. 4–5, 6–8.)

To maintain the issues on his part, Naphtaly put in evidence two patents of the United States to him, which admittedly embraced the land in controversy, and he proved the rental value of the land, and that whilst he was in the peaceable and quiet possession thereof he was ousted therefrom by the defendants, and that they had ever since withheld possession from him. (Rec. 11–13.)

It was thus admitted by the defendants (Rec., p. 13) "*that at the time of the issuance of the patents hereinbefore* "*described the lands therein and in the complaint described* "*were public lands of the United States, subject to sale* "*under the laws of the United States;*" and "that de- "fendants did not propose to connect themselves in any "manner or form with the title of the United States to

" the premises described in the complaint herein, or any " part thereof, either by certificate of purchase, patent, or " anything of the kind."

Thereupon the defendants offered in evidence the record of proceedings in the General Land Office at Washington, upon which Naphtaly obtained his patents (Rec. 13–21), to the introduction whereof plaintiff objected because immaterial, incompetent, and irrelevant for the purpose of affecting the validity of the patents. The Court sustained the objection, to which ruling defendants excepted and thereupon rested. Jury having been waived, the Court ordered judgment, and same was duly entered in favor of Naphtaly and against the defendants, in accordance with the prayer of the complaint. (Rec. 8.)

Motion for new trial having been denied, the case was taken by writ of error to the Circuit Court of Appeals, where the judgment of the Circuit Court was affirmed with costs. Thence the case comes by writ of error to this Honorable Court.

ARGUMENT.

The ten assignments of error raise only two general questions:

1. CAN THE DEFENDANTS BELOW, UPON THEIR ADMISSIONS OF RECORD, AND IN AN ACTION AT LAW, COLLATERALLY ATTACK THE NAPHTALY PATENTS?

2. IF SO, WAS THEIR EVIDENCE OFFERED SUFFICIENT TO INVALIDATE SAID PATENTS?

I.

Collateral Attacks upon Patents in a Law Action.

The record presents the case of a naked trespasser, who has wrongfully dispossessed a patentee of the United

States, and then seeks in an action of ejectment to defend his trespass by collaterally attacking the validity of the patent. It is precisely the case ruled upon by this Court in *Ehrhardt* v. *Hogaboom*, 115 U. S. 68, where it was said:

"He was, as to the twenty acres, a simple intruder, "without claim or color of title. He was, therefore, in "no position to call in question the validity of the patent "of the United States for those acres, and require the "plaintiff to vindicate the action of the officers of the "Land Department in issuing it." * * *

The general doctrine as to the conclusiveness of a patent of the United States in an action at law has been repeatedly announced by this Court. All presumptions support the regularity of the proceedings upon which such patent issued; and if the land embraced therein was public land subject to sale, and not previously sold or reserved, the patent is not open to collateral attack in an action of ejectment. The Land Department having jurisdiction under the law to convey the land, resort must be had to a court of equity for relief, and then only when a complainant connects himself with the original source of title, and upon a showing that, by reason of superior equities, his rights have been injured by the issuance of the patent. Otherwise, a patent can only be assailed in a direct proceeding on the part of the United States.

Such a trespasser cannot be heard against the patent, either at law or in equity. For in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 647, in holding the patent protected from collateral attack at law, this Court further declared:

"He must resort to a court of equity for relief, and "even there his complaint cannot be heard unless he con-"nect himself with the original source of title, so as to

" be able to aver that his rights are injuriously affected
" by the existence of the patent; and he must possess
" such equities as will control the legal title in the
" patentee's hands. Boggs *v.* Mining Co., 14 Cal. 279,
" 363. It does not lie in the mouth of a stranger to the
" title to complain of the act of the Government with re-
" spect to it. If the Government is dissatisfied, it can, on
" its own account, authorize proceedings to vacate the
" patent or limit its operation."

In *Hartman* v. *Warren*, 76 Fed. Rep. 157, the Circuit Court of Appeals, in full discussion of the authorities on this question, holds:

"In every case cited by counsel for appellant in which
" the equitable right to the land prevailed over the legal
" title, the former had either been recognized by the
" United States by a grant or an entry of the land, or by
" the acceptance of payment for it, so that the equitable
" owner was in privity with the Government, or the
" equitable right had been *initiated* before the claim
" which went to patent by a settlement or an improve-
" ment of the land under a law which gave to the
" settler or improver a right to be preferred in its acqui-
" sition."

Smelting Company v. *Kemp*, *supra*, was a case wherein the defendant offered in evidence the record of the proceedings upon which the patent was based, in order to impeach its validity (precisely as in the case at bar), and the admission of this evidence by the Court below was held by this Court to have been error. It was therein emphatically said:

"A patent in a court of law is conclusive as to all
" matters properly determinable by the Land Department,
" when its action is within the scope of its authority, that
" is, when it has jurisdiction under the law to convey the
" land. In that case the patent is unassailable for mere

" errors of judgment * * * On the other hand, a " patent may be collaterally impeached in any action, and " its operation as a conveyance defeated, by showing that " the Department had no jurisdiction to dispose of the " lands;—that is, that the law did not provide for selling " them, or that they had been reserved from sale, or dedi- " cated to special purposes, or had been previously trans- " ferred to others. In establishing any of these particu- " lars, the judgment of the Department upon matters " properly before it is not assailed, nor is the regularity " of its proceeding called into question; but its authority " to act at all is denied and shown never to have existed.

" According to the doctrine thus expressed and the " cases cited in its support,—*and there are none in conflict* " *with it*—there can be no doubt that the Court below " erred in admitting the record of the proceedings upon " which the patent was issued, in order to impeach its " validity. The judgment of the Department upon their " sufficiency was not, as already stated, open to contes- " tation. If in issuing a patent its officers took mistaken " views of the law, or drew erroneous conclusions from " the evidence, or acted from imperfect views of their duty, " or even from corrupt motives, a court of law can afford " no remedy to a party alleging that he is thereby " aggrieved. He must resort to a court of equity for re- " lief, and even there his complaint cannot be heard un- " less he connect himself with the original source of title, " so as to be able to aver that his rights are injuriously " affected by the existence of the patent; and he must " possess such equities as will control the legal title in " the patentee's hands. * * * It does not lie in the " mouth of a stranger to the title to complain of the acts " of the Government with respect to it. If the Govern- " ment is dissatisfied, it can, on its own account, author- " ize proceedings to vacate the patent or limit its opera- " tion."

See *Johnson* v. *Towsley*, 13 Wall. 72.
Vance v. *Burbank*, 101 U. S. 519.
Steel v. *Smelting Co.*, 106 U. S. 454.

Under these established principles, the Court below did not err in excluding the evidence offered to attack the validity of the Naphtaly patents, unless that evidence was directed to a want of authority in the Land Department to issue the patents. But obviously the admission that the lands were public lands, subject to sale under the laws of the United States, put at rest all questions of jurisdiction; and no fraud or imposition being alleged, the offer of proof simply challenged the correctness of the judgment of the Secretary of the Interior upon matters of fact within his jurisdiction. Under the 7th section, Act July 23, 1866, the Land Department was authorized to recognize a preference right of purchase by parties who established to its satisfaction the following facts:

1st. That the applicant purchased the lands from a Mexican grantee, or his assigns.

2d. That he purchased the lands in good faith and for a valuable consideration.

3rd. That the grant had "subsequently been rejected," or the lands purchased had been "excluded from the "final survey."

4th. That the purchasers had "used, improved and "continued in the actual possession of the same accord-"ing to the lines of their original purchase."

5th. That no valid adverse right or title (except of the United States) existed thereto.

6th. That the lands did not contain mines of gold, silver, cinnabar, or copper.

These are matters of fact of which the statute requires proof to the satisfaction of the Land Department. The issuance of the patents to Naphtaly raised the presumption that all of these facts were proven in his favor. That presumption is conclusive in an action at law, where the lands were admittedly public lands subject to sale, and

not previously sold nor reserved. Especially so as against a naked trespasser. As was said by this Court in *Ehrhardt* v. *Hogaboom*, 115 U. S. 69,—

" It is the duty of the Land Department, of which the " Secretary is the head, to determine whether land patented " to a settler is of the class subject to settlement under " the pre-emption laws, and his judgment as to this fact is " not open to contestation in an action at law by a mere " intruder without title."

The offer of proof was obviously an effort to show that the Secretary of the Interior took a mistaken view of the law or drew erroneous conclusions from the evidence ; and it was properly excluded by the Court below. As was said in *Quinby* v. *Conlan*, 104 U. S. 425,—

" The proofs offered in compliance with the law are to " be presented, in the first instance, to the officers of the " district where the land is situated, and from their decis- " ion an appeal lies to the Commissioner of the General " Land Office, and from him to the Secretary of the In- " terior. For mere errors of judgment as to the weight " of evidence on these subjects by any of the surbordi- " nate officers, the only remedy is by an appeal to his " superior of the Department. The courts cannot exercise " any direct appellate jurisdiction over the rulings of those " officers, or of their superior in the Department in such " matters, nor can they reverse or correct them in a col- " lateral proceeding between private parties."

In concluding our discussion of this point, we further suggest that this action could stand upon the admitted prior possession of Naphtaly. He and his grantors had used and possessed this land for half a century under claim of title before he was forcibly dispossessed by plaintiffs in error here (defendants below). Such prior

possession under claim of title is sufficient to sustain this action as against mere intruders.

II.

If, however, it was error to exclude the evidence offered, then was such evidence sufficient to invalidate the patents?

Three propositions are advanced by plaintaiffs in error to sustain this contention.

1st. That one Secretary of the Interior has no power to grant a rehearing of a case decided by his predecessor; and, thereupon, as the claim of Naphtaly was denied by Secretary Vilas, the subsequent reconsideration and allowance thereof by Secretary Noble was without authority of law, and void.

2d. That as the preference right to purchase provided for in Section 7, Act of July 23, 1866, was extended to purchasers, &c., from "Mexican *grantees* or assigns, "which *grants* have subsequently been rejected," and as the Romero claim was rejected because there was no *grant*, therefore the Land Department was without authority to permit a purchase of *that* land under the Act of 1866.

3d. That even if a right of purchase ever existed in any one, Naphtaly was not a purchaser in good faith, he having bought after final rejection of the Romero claim of title.

A.

Power of the Secretary to Reconsider.

The Secretary of the Interior is authorized to prescribe Rules of Practice for the conduct of business in the Land Department, and the legal effect of such regulations has

been uniformly recognized. The rule governing motions for review of decisions of the Secretary of the Interior, which was in force at date of the decision of Secretary Vilas of February 4, 1889, which was approved by Secretary Vilas under date of June 14, 1888, was as follows (see printed Rules of Practice, approved August 13, 1885):

"Rule 114. Motions for review before the Secretary of "the Interior, and applications under Rules 83 and 84, "shall be filed with the Commissioner of the Land Office, "who will thereupon suspend action under the decision "sought to be reviewed, and forward to the Secretary said "motion or application."

The record does not challenge the regularity of the motion for review in pending case, and same may therefore be assumed. To show, however, the exact sequence of dates, we print for convenient reference, in appendix, copy of the motion for review, of the letter filing same, and of the proof of service. Mr. Vilas went out of office March 4, 1889. His decision in the Naphtaly case was dated February 4, 1889 (Rec., p. 10), and the motion for review was filed on March 1, 1889. The review was thus prayed for during the incumbency of the SAME Secretary who rendered the decision.

No question has been made as to the power of a Secretary to review his own decision. The contention of plaintiff in error has been that a succeeding Secretary could not review the decision of his predecessor. Inasmuch, then, as jurisdiction to review attached during the official term of Secretary Vilas, it must have continued after his retirement until decision of his successor, unless the jurisdiction to review was purely personal to the temporary incumbent of the office. We need scarcely answer that contention.

The rule is well established that where title has passed out of the United States, so that the jurisdiction of the Executive Department has ended, there is no authority to review. That is the doctrine of *Noble* v. *Logging Co.*, 147 U. S., and of *U. S.* v. *Stone*, 2 Wall. 537, relied upon by plaintiffs in error. In such cases no succeeding Secretary could lawfully review the executed decision of his predecessor. Neither could the same Secretary have done so under like conditions. But no such rule prevails where the matter is still within the jurisdiction of the Department. A decision being unexecuted, the matter is *in fieri*, and is subject to such further action as the officer who is called upon to act may determine to be proper and lawful. The power of review where the *rem* is still within the jurisdiction of the Secretary has been uniformly exercised in the Land Department, and the principle underlying such exercise of revisionary authority was clearly stated by this Court in *Williams* v. *U. S.*, 138 U. S. 524:

"It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervisory power which will enable him, in the face of these unexpected contingencies, to do justice."

So also in *Knight* v. *Land Association*, 142 U. S. 178:

"For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to to institute proceedings for its annulment, it would hardly

" be seriously contended the Secretary might not in-
" terfere and prevent the execution of the patent. He
" could not be obliged to sit quietly and allow a proceed-
" ing to be consummated which it would be immediately
" his duty to ask the Attorney-General to take measures
" to annul."

And the point raised by plaintiffs in error was distinctly ruled upon in *New Orleans* v. *Paine*, 147 U. S. 266, thus:

" Until the matter is closed by final action the proceed-
" ings of an officer of the Department are as much open to
" review or reversal by himself, *or his successor*, as are the
" interlocutory decrees of a Court open to review upon the
" final hearing."

And the Court at presest term—in *Michigan Land & Lumber Co.* v. *Rust*, *No.* 57—has settled the question beyond the need for further discussion by distinctly holding executive jurisdiction continuing until legal title has vested when the Courts thereafter take jurisdiction.

B.

Want of authority to sell lands to purchasers, &c., where grant was rejected upon the ground that no grant was ever issued by Mexico.

The contention of plaintiff in error is that the preference right of purchase extended by Section 7, Act of July 23, 1866, has no application where no grant had been made by Mexico. The argument in brief is that, there having been no grant, there could be no rejection of a grant, and hence there could be no Mexican grantee from whom to purchase.

This contention is narrow, technical, and unsound. It is a mere play upon words, which defeats the remedial

purpose of the statute. Congress had in 1851 provided for the adjudication of these grant claims, and pending their final settlement had reserved all lands within their claimed limits from the operation of the public land system. (See *Newhall* v. *Sanger*, 92 U. S. 761.) Many years were occupied in this inquiry, during which the extent, whether of title or location, to which these claims would be finally located was purely a matter of legal opinion. In the meantime California was being rapidly settled. The most valuable agricultural lands were naturally included within these Mexican grant claims, and were the object of most speedy sales and transfers. They could not be purchased under the public land laws, having been reserved therefrom until final judicial rejection, and the apparent ownership of the grant claimants to all lands within their claimed limits was fully recognized and protected by the courts, both State and Federal (*Van Reynegan* v. *Bolton*, 95 U. S. 33). These lands, so claimed, were legally sold, and the tracts so purchased were extensively improved and resold over and over again. After all this had occurred, during the lapse of many years, the examination under authority of Congress resulted in some cases in rejecting the entire claim, in other instances in confirming it in part, and in others in confirming it as an entirety. In the case of a wholly rejected grant, all these Mexican grant claimants and their assigns were left absolutely without title. In partially confirmed grants, the segregration, like a blanket, could only cover a given area, and when pulled over one set of derivative claimants it was necessarily pulled off another set. In confirmation as an entirety, it often happened that the survey did not locate the boundaries as they had been theretofore claimed, and thus excluded occupants under the grant claim of title. In one way and

another, many derivative claimants were thus left in actual possession, but without title. They had paid large sums for their lands, and had put upon them valuable improvements. They were, too, the only persons whose right of possession had been recognized and protected by the courts. The equities of these parties appealed strongly to Congress, and at first received recognition in a series of special acts, which finally led up to the general provisions of the seventh section of the Act July 23, 1866. No less than seven of such special laws were thus enacted prior to said general law (Soscol Ranche Act, March 3, 1863, Stat. 12, p. 808; Rancho Bolsa de Tomales, Stat. 13, p. 136; Rancho Laguna de los Santos Calle, Stat. 13, p. 372; Ex Mission San José, Stat. 13, p. 534; City and County of San Francisco, Stat. 14, p. 4; Rancho los Prietos y Najalayegua, Stat. 14, p. 589; Towns of Benina and Santa Cruz, Stat. 14, p. 209), until Congress finally covered the cases of all like purchasers or their assigns in similar possession under the general preference right of purchase enacted in Section 7, Act of July 23, 1866. Congress did not therein undertake to validate defunct titles. No donation was made. Congress simply determined by this legislation that a citizen who had in good faith bought from these Mexican claimants and occupied the lands purchased, and whose possession under color of title had been recognized and protected, but whose claim of title had failed, should have a right to purchase those lands in preference to a party who had no recognized right of possession, and who had neither purchase money nor improvement at stake. The principle of the statute was not the ownership of a legal title, but rather the protection of an equity; and the required qualifications were a purchase from one claiming to have been a Mexican grantee, and possession under such claim of title according to the

lines of purchase, but to which the claim of title had failed ,—failed for either of the only two possible reasons, viz., that the title had been *rejected*, or that the lands had been surveyed out. The inquiry under the obvious purpose of the law is, Did the claimant of the preference right of purchase from the United States buy these lands from a grantor whom they believed to have been a grantee of the Mexican Government; and, if so, has he improved and had possession of the lands so purchased? The principle was clearly stated by the Supreme Court of California in *Bascomb* v. *Davis*, 56 Cal. 152, wherein it was said:

"If we should hold that a 'Mexican grantee' means a "person to whom a grant has been made by the Mexican "Government, it is quite clear that Galindo would not be "within that description; but that construction of the Act "would render it superfluous, and Mexican grantees or "their assigns would not require any such aid. The Act, "therefore, must have been passed for the benefit of "others than those who had purchased lands of grantees of "the Mexican Government. We believe that it was passed "for the benefit of those who, in good faith and for a "valuable consideration, had purchased the lands which "were *supposed* to have been granted by the Mexican "Government, and who had used, improved, and con-"tinued in the actual possession thereof as provided in "the Act.

"It seems to us that the good faith of the purchaser, "his payment of a valuable consideration, and his occu-"pation and improvement of the land were the consid-"erations which moved Congress to pass this Act; and "if so, the case of this defendant is fairly within the "spirit of the law. In the absence of any valid or ad-"verse right or title, or *bona-fide* pre-emption claim, there "does not seem to be anything inequitable in the United "States preferring as a purchaser one who has once "paid for the land, under the honest but erroneous im-

" pression that he was acquiring a valid title, to the one " who had never purchased or occupied it. We are, " therefore, of the opinion that the defendant was a " purchaser within the meaning of the Act of Congress " above referred to."

The *principle* of construction for which we contend was squarely ruled upon by this Honorable Court in *Winona and St. Peter R.R. Co.* v. *Barney*, 113 U. S. 626. Congress had granted certain lands to the Territory of Minnesota for railroad purposes, and had further provided indemnity for specified losses in the lands " granted " as aforesaid." Under the same technical construction of the word "granted" that is asserted here by plaintiffs in error, it was contended that the Government did not own lands sold by it before date of the grant, and as it could not grant what it did not own, indemnity was not due under the words "granted as aforesaid." But this Court, in deciding that the indemnity covered losses both before and after date of the grant, disposed of the above contention by saying :

" It is of no purpose to say against this construction " that the Government could not grant what it did not " own, and, therefore, could not have intended that its " language should apply to lands which it had disposed " of. As already said, the whole Act must be read to " reach the intention of the law-maker. It uses, indeed, " words of grant which purport to convey what the " grantor owns, and, of course, cannot operate upon lands " with which the grantor had parted; and, *therefore*, " *when it afterwards provides for indemnity for lost por-* " *tions of the lands 'granted as aforesaid' it means of the* " *lands purporting to be covered by those terms.*"

By analogous reasoning Section 7, here in question, in saying " which grants have subsequently been rejected,

" or where the lands so purchased have been excluded " from the final survey of any Mexican grant " obviously is to be read as " which purported grants " or " which " claims of grants." This follows necessarily, because the evil intended to be remedied was a *bona-fide* purchase and continued possession culminating in a *total failure of title.*

C.

That Naphtaly was not a Purchaser in Good Faith, he having bought after Final Rejection of the Romero Title.

The Romeros, on January 18, 1844, solicited a grant from the Mexican Governor. Upon their petition was a marginal decree directing the Secretary to report upon the subject, " having first taken such steps as he may deem " necessary." There was also a certificate of the Secretary that the Governor directs the first Alcalde of San Jose to summon the colindantes and report upon their allegations ; a report of the Alcalde that the colindantes, having been duly summoned, made no objection to the grant, but that another party had claimed the same tract several years before ; a report from the Secretary that there was no obstacle to making the grant ; a decree directing measurement of the land by the proper judge, and that he " certify the result so that it may be granted to the " petitioners ;" a second petition of the Romeros stating failure of judge to make measurement and asking provisional grant ; report of Secretary that survey should first be effected, and decree of Governor, viz., " Let " everything be done agreeably to the foregoing report."

In *Romero* v. *United States*, 68 U. S. 740, the United States Supreme Court decided that these documents were

not sufficient evidence to establish a grant or concession from Mexico, and finally rejected the claim. This was in December, 1863. But in January, 1844, the Romeros went into possession of the lands then petitioned for, and in 1846 or 1847 the tract here in controversy was partitioned to Innocencio Romero. Said Innocencio in turn sold and conveyed for value, on December 26, 1853, to Domingo Pujol and Francisco Sanjurjo; and through subsequent mesne conveyances the same tract passed to S. P. Millett, August 5, 1859, who continued in the actual possession and cultivation thereof according to the lines of the original purchase to the time of the passage of the Act of July 23, 1866, and long subsequent thereto. Thereafter the title passed for value through various parties, and with continued use and possession, until it was finally vested in Naphtaly.

So that the title passed for value from the Romeros, the original Mexican claimants, ten years prior to final rejection of the title, and it similarly was vested in Millett four years prior to such rejection, and remained in him until long subsequent to the passage of the Act of July 23, 1866. The material fact, then, is that Millett purchased prior to the final rejection of the grant, and was at the date of the passage of the Act of July 23, 1866, a fully qualified beneficiary of the preference right of purchase under the seventh section thereof. The contention of plaintiff in error is therefore a mere denial of the assignability of that preferential right of purchase.

But the entire policy of the law in the matter is against restraints upon the alienation of interests in or titles to lands; and it has been uniformly held that every right, title, interest, or claim in lands is assignable or inheritable, unless such transfer or dissent is prohibited by statute. *Co. Litt.* 46b; *Washburn on Real Property*, Ch. 1, Sec.

20; *Thredgill* v. *Pintard*, 12 How. 24; *Myers* v. *Croft*, 13 Wall. 291; *Lamb* v. *Davenport*, 13 Wall. 418; *Hussey* v. *Smith*, 99 U. S. 22. The most recent reaffirmance of this general right to assign interests in lands will be found in *Webster* v. *Luther*, 163 U. S. 331, wherein this Court affirmed the right to transfer before entry a right of additional homestead.

The language of the 7th section, Act of July 23, 1866, clearly does not prohibit the alienation of the preference right therein provided for; and neither would the purpose of the law. On the contrary, the statute in terms conferred the preference right only upon assigns. Nor did the law impose, as a condition upon this right to purchase, some act to be performed by a particular beneficiary, of such character as to make the right a personal one. On the contrary, the condition of the law had already been performed, and the right to make entry had vested. It did not cease merely because, as in present case, the unsurveyed character of the land did not put it in condition for entry until the beneficiary had died or had alienated his interest. The continued possession and under purchase for value from the original Mexican grantee or his "assigns," were the equities to which the relief of the law was directed; and those equities, established and vested at date of the remedial Act, were quite as potent in the hands of one assign as in the ownership of another. The hardships of the case, which Congress had in view, were quite as great in either case; and whilst Naphtaly is chargeable at time of his purchase with notice of the prior rejection of the grant title, he is equally entitled to knowledge of the vesting of the perference purchase right and of its assignability. His right is clearly within the equity of the Act of Congress.

The rulings of the Land Department have been uni-

formly in support of the right of assignment. (*Wilson* v. *C. & O. R.R. Co.*, 1 Copp's Land Owner, 471; *Owen* v. *Stevens*, 3 Land Decisions, 401; *Welch* v. *Molino*, 7 *ib.* 210.) Such continuous executive construction for thirty years past, and the innumerable rights vested thereunder, should constitute a very persuasive, if not wholly conclusive, argument.

Since writing foregoing we are served with brief for plaintiffs in error. We need only add—

1. The Mexican grant claim was *sub judice* until final rejection thereof by this Court at December term, 1863. The preference right of purchase from the United States under Sec. 7 of the Act of 1866 has never been denied any claimant thereunder because he or his grantors purchased after adverse decision by the Board of Land Commissioners or the District Court. The final determination of title rested in *this* Court, and until such final rejection the right of transfer of the grant claim carried with its exercise the recognition of the preference right of purchase in such "assigns," under the plain provisions of Sec. 7. The claim here in question passed into the hands of third parties as early as 1853.

2. The several requirements imposed by the seventh section were matters of *fact*, determinable by the U. S. Land Department. In the absence of fraud or legal mistake, such findings are conclusive. This is settled law, clearly established by numerous decisions of this Court, some of which are cited *supra*. The doctrine is again clearly and forcibly stated in the analogous case of *Wormouth* v. *Gardner*, 112 Cal. 506, 512, thus:

"Whether Throckmorton did, in fact, purchase the "land for a valuable consideration, or whether after his "purchase he used and improved and continued in the "actual possession of the same according to the lines of

" his purchase, were questions of fact, to be determined " by the Secretary of the Interior. The good faith of " Throckmorton in making the purchase, as well as his " belief that the land he purchased was included within " the original limits of the Mexican grant, were also facts " to be determined by that officer from all the circum- " stances under which the purchase was made. Whether " that officer properly considered the weight to which the " evidence before him was entitled, or whether he drew " correct conclusions from that evidence, his determina- " tion with reference to these facts, whether correct or " erroneous, is conclusive upon the judicial tribunals. " These tribunals cannot exercise a revisory jurisdiction " over him in matters which are within the scope of the " authority conferred upon him, but if, upon the undis- " puted facts, he made an erroneous application of the " law pertinent to those facts, his action is open to re- " view."

Hence the assignments of error which assume that the Court below erroneously held Millett to be a purchaser in good faith are without force or relevancy here. The same answer equally applies to assignment of error VII, inasmuch as the finding of the Secretary clearly covered the *fact* and *extent* of the possession to which the right of purchase under the seventh section of the Act of 1866 was extended.

3. Equally erroneous is the assumption that claimants under Section 7 must cause a private survey of their lands to be made, and must purchase in accordance therewith. *Contra*, final rejection of the grant claim or exclusion of the land from a confirmed claim on final survey thereof left *such* land as *public* lands of the United States with preference right of purchase in the claimant. They were thereafter to be surveyed as public lands, and by the established system applicable thereto. Section 7 in terms requires their survey as such " under existing laws " *before*

the right of purchase can be exercised. Such has been the uniform and correct rule of administration by the United States Land Department. Until thus officially surveyed by the United States the opportunity to present claim and proof and make such purchase and entry manifestly could not be exercised by the claimant. The diagram in the record which accompanied Naphtaly's application to so purchase defines in red dotted lines the boundaries of such proven possession with relation to the surveyed sections and parts of sections covered by his purchase and patents from the United States.

4. The fact appears that the Romeros *partitioned* their claim in 1846 or 1847 (Rec. 13), and thereunder Innocencio Romero took exclusive possession of the tract, which he subsequently used and cultivated, and thereafter sold, in 1853, and which passed from purchaser to purchaser until Naphtaly's purchase and possession. This *fact* answers all of the argument that no right of purchase was conferred by the seventh section of the Act of 1866 upon a claim for an undivided interest. Whilst the argument is unsound, it has no relevancy here, for parol partition with severance of possession is as complete and binding as by formal conveyance. This matter was fully heard and determined by the Secretary in this case, and his finding is neither erroneous nor subject to review.

5. The admission of defendants (Rec. 13) demonstrates that they assert *here* no claim under any law of the United States. The assumption of opposing brief that, notwithstanding this, they may assert our patents to be void is without force. They concede that the lands were public; were within the jurisdiction of the Land Department, and manifestly that jurisdiction was exercised. The authorities cited on opposing brief on this head deal only with cases where the jurisdiction of the Department was wholly lacking, and hence attempt to deal with the *subject-*

matter—i. e., the lands—renders the patent void. The distinction is controlling and too obvious to require discussion.

Jones v. *Wilkinson*, 44 Pac. Rep. 735, 737.

Conclusion.

Upon the one hand appears continuous use and possession by the original claimants since 1844, and their successive grantees in interest for a period of over fifty years. The protection of the equity of *that* possession was the clear design of the Act of 1866, which, as its title imports, was an Act "To quiet land titles in California." The Act has been so administered in numerous cases, and repeated judicial rulings have upheld such design and administration. Intruding upon that possession of many years come the defendants—admitted trespassers, intruding with full knowledge of the existence and extent of the prior right and possession, far outrunning the common-law period of limitation. They have been again and again ejected under judicial process, returning *vi et armis* and in contempt of judicial process. What standing should they enjoy in any court of law or equity, viewed from any legal or moral standpoint?

Under all the circumstances disclosed by the record, the concurring decisions of the Circuit Court and Circuit Court of Appeals are manifestly right and should be here affirmed.

For the convenience of the Court we print the decisions of the Secretary of the Interior rendered in the case in following appendix.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Defendant in Error.

APPENDIX.

A. D. S. M. L. 86271, 1897.
"G." I. R. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 15, 1897.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of the motion for review of the decision of the Secretary of the Interior, rendered on February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.*, involving lands in Tp. 1 N., R. 2 W., and Tp. 1 S., R. 2 W., M. D. M., San Francisco, Cal., land district; also copy of letter of Britton and Gray and Curtis and Burdett of March 1, 1889, filing said motion, and also copy of the proof of service of said motion on B. B. Newman and J. A. Robinson are true and literal exemplifications of said papers on file in this office.

In witness whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] BINGER HERMANN,
Commissioner of General Land Office.

"D."

A. T. BRITTON.
H. J. GRAY.
A. B. BROWNE.
W. W. DUDLEY.

BRITTON & GRAY,
Attorneys and Counselors at Law,
Pacific Building, 622 F Street N.W.
WASHINGTON, D.C., *March* 1*st*, 1889.

Hon. S. M. STOCKSLAGER,
Commissioner of the General Land Office.

SIR: Herewith we have the honor to file motion for review and reconsideration of the decision rendered by the Honorable Secretary of the Interior on February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.*, San Francisco, California, Land District, and for reargument of the case. We also file proof of service of said motion on the attorneys of record for Bregard *et al.*

Very respectfully,

BRITTON & GRAY,
CURTIS & BURDETT,
Attys. for Jos. Naphtaly.

DISTRICT OF COLUMBIA, }
City of Washington, } *ss:*

George Brent, being duly sworn, deposes and says: That on March 2nd, 1889, he, for Britton & Gray, mailed, at the City Post Office, Washington, D. C., two registered letters, addressed, respectively, to B. B. Newman, Esq., attorney at law, and J. A. Robinsin, Esq., attorney at law, San Francisco, California, said letters each containing a copy of the motion of Britton & Gray and Curtis & Burdett, attorneys for Joseph Naphtaly, for review, reconsideration, and reargument, before the Secretary of the Interior, in the matter of Joseph Naphtaly *v.* L. L. Bregard

et al., in further evidence whereof the registry receipts therefor are hereto appended.

GEORGE BRENT.

Subscribed and sworn to before me this 2nd day of March, A. D. 1889.

[SEAL.] E. L. WHITE,
Notary Public.

Registered { Letter / Parcel* } No. 5350, P. O., Washington, D.C.

Received 3 / 2, 1889, of Britton & Gray, 622 F St. N.W., a { Letter / Parcel* } addressed to B. B. Newman, San Francisco, Cal.

JOHN W. ROSS, P. M.,
Per BROOKS.

Registered { Letter / Parcel* } No. 5351, P. O., Washington, D. C.

Received 3 / 2, 1889, of Britton & Gray, 622 F St. N. W., a { Letter / Parcel* } addressed to J. A. Robinson, San Fran., Cal.

JOHN W. ROSS, P. M.,
Per BROOKS.

IN THE DEPARTMENT OF THE INTERIOR.

JOSEPH NAPHTALY *v.* L. L. BREGARD *et al.* — Involving lands in T. 1 N., R. 2 W., and T. 1 S., R. 2 W., M. D. M., San Francisco, Cala., Land District.

Motion for Review and Reconsideration of Decision Rendered by the Hon. Secretary of the Interior, February 4, 1889, and for Argument.

Now comes Joseph Naphtaly by Britton and Gray and Curtis, and Burdett, his attorneys in the above-entitled

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* The word "Parcel" is canceled.—Printer.

matter, and respectfully moves a review and reconsideration of the decision herein rendered by the Hon. Secretary of the Interior on February 4, 1889, wherein the claim of said Joseph Naphtaly to enter the land in question under the 7th section, Act of Congress approved July 23, 1866, was held to be invalid and was rejected.

Such motion for review and reconsideration is based upon the following allegations of errors in said decision, in matters both of fact and of law, appearing upon the face of the record:

1st. Error in ruling that it is impossible to hold that at the time of the passage of the Act of July 23, 1866, there was any person entitled to the pre-emption right conferred by the 7th section of that Act, to the land here in question, as a purchaser in good faith, who had used, improved and continued in the actual possession of specific land as according to the lines of the original purchase.

2d. Error in holding that a purchaser in good faith, within the contemplation and meaning of the 7th section, Act of July 23, 1866, is only one who purchased in the sincere and fair belief that he was acquiring a good title to the land purchased; who is chargeable with no notice of defects in the title which may operate to defeat it, and who is not chargeable with knowledge that he purchased only a speculative title.

3rd. Error in holding that the conveyance from Innocencio Romero and wife to Domingo Pujol and Francisco Sanjurjo of December 26, 1853, shows upon its face that the grantees understood that they were purchasing a title which was *sub judice*, and which was speculative, and that such purchase was therefore not in good faith within the meaning of the statute.

4th. Error in ruling in effect that the purchaser of a

title *sub judice* was not a purchaser in good faith within the meaning of the said 7th section, Act of July 23, 1866, or was, for the purposes of that statute, charged with notice of defects in the title purchased.

5th. Error in holding that the deed from Pujol and Sanjurjo to James W. Tice of February 14, 1855, carried upon its face the same evidence, or any evidence, that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

6th. Error in considering the parol testimony found in the record as in any way modifying the statement of consideration expressed in the last mentioned deed, or as showing that a valuable consideration for the land was not paid by the grantees therein.

7th. Error in holding that the conveyance from Jas. W. Tice to Andrew J. Tice of August 8, 1853, also showed upon its face that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

8th. Error in citing as in any way material to the case the fact that the conveyance made by Andrew J. Tice to Soloman P. Millett of October 17, 1859, was made after the grant claim had been rejected by the District and Circuit Courts of the United States, the case then being on appeal to the Supreme Court, and therefore not finally rejected.

9th. Error in holding that the conveyance of the land by Jas. W. Tice to Uhretta Tice, April 6, 1861, was in any way effective; that, if effective, it was not for a valuable consideration, within the meaning of the said 7th section, Act of July 23, 1866; that same was made after the rejection of the grant claim by the Board of Land Commissioners, by the District Court, and by the Supreme

Court of the United States, and that same was not made in that good faith which the law contemplates.

10th. Error in ruling that the title under the grant had been from the beginning a merely speculative title; that every deed from the original Mexican grantee had carried on its face notice of the defect and of the contingency; that the consideration paid by the several purchasers was not for the land but for stock, with the privilege of a cattle range, in any such sense as to take the matter out from the operation of the said 7th section, Act of 1866.

11th. Error in finding from the record that the conveyances of the grant title were conveyances of an undivided interest only; that there was nothing like definite understanding of a tract of land as conveyed, or which the purchasers could possess according to the lines of the original purchase; that there was no such thing as a well-defined tract of land which the parties could claim to have been fairly conveyed; that there was no exclusive possession by the purchasers; that the boundaries were indefinite and uncertain, and the possession doubtful and contested.

12th. Error in holding that to establish a right of entry under the said 7th section, Act of July 23, 1866, it was necessary for Naphtaly to have shown actual and continuous possession by himself and his grantors of all the land originally conveyed by Innocencio Romero to Pujol and Sanjurjo, and that possession of a portion of the land originally purchased under the grant does not entitle the purchaser to enter under the said Act the portion so in possession.

13th. Error in holding that there is in the record no sufficient evidence of the partition of the grant between the three original claimants, the brothers Innocencio, Jose, and Mariano Romero.

14th. Error in finding from the evidence that after the

title *sub judice* was not a purchaser in good faith within the meaning of the said 7th section, Act of July 23, 1866, or was, for the purposes of that statute, charged with notice of defects in the title purchased.

5th. Error in holding that the deed from Pujol and Sanjurjo to James W. Tice of February 14, 1855, carried upon its face the same evidence, or any evidence, that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

6th. Error in considering the parol testimony found in the record as in any way modifying the statement of consideration expressed in the last mentioned deed, or as showing that a valuable consideration for the land was not paid by the grantees therein.

7th. Error in holding that the conveyance from Jas. W. Tice to Andrew J. Tice of August 8, 1853, also showed upon its face that a speculative title was the subject of the transfer, and that such purchase was not in good faith within the meaning of the statute.

8th. Error in citing as in any way material to the case the fact that the conveyance made by Andrew J. Tice to Soloman P. Millett of October 17, 1859, was made after the grant claim had been rejected by the District and Circuit Courts of the United States, the case then being on appeal to the Supreme Court, and therefore not finally rejected.

9th. Error in holding that the conveyance of the land by Jas. W. Tice to Uhretta Tice, April 6, 1861, was in any way effective; that, if effective, it was not for a valuable consideration, within the meaning of the said 7th section, Act of July 23, 1866; that same was made after the rejection of the grant claim by the Board of Land Commissioners, by the District Court, and by the Supreme

Court of the United States, and that same was not made in that good faith which the law contemplates.

10th. Error in ruling that the title under the grant had been from the beginning a merely speculative title; that every deed from the original Mexican grantee had carried on its face notice of the defect and of the contingency; that the consideration paid by the several purchasers was not for the land but for stock, with the privilege of a cattle range, in any such sense as to take the matter out from the operation of the said 7th section, Act of 1866.

11th. Error in finding from the record that the conveyances of the grant title were conveyances of an undivided interest only; that there was nothing like definite understanding of a tract of land as conveyed, or which the purchasers could possess according to the lines of the original purchase; that there was no such thing as a well-defined tract of land which the parties could claim to have been fairly conveyed; that there was no exclusive possession by the purchasers; that the boundaries were indefinite and uncertain, and the possession doubtful and contested.

12th. Error in holding that to establish a right of entry under the said 7th section, Act of July 23, 1866, it was necessary for Naphtaly to have shown actual and continuous possession by himself and his grantors of all the land originally conveyed by Innocencio Romero to Pujol and Sanjurjo, and that possession of a portion of the land originally purchased under the grant does not entitle the purchaser to enter under the said Act the portion so in possession.

13th. Error in holding that there is in the record no sufficient evidence of the partition of the grant between the three original claimants, the brothers Innocencio, Jose, and Mariano Romero.

14th. Error in finding from the evidence that after the

date of such partition the two brothers, Jose and Mariano Romero, were not in actual possession of the land so set off to them, respectively, and in considering that fact, if established, as in any way material as to the case here under consideration.

15th. Error in holding that the deeds executed by Innocencio Romero and wife; those executed by Jose and Mariano Romero; the petition to the Board of Land Commissioners for confirmation of the claim, and the instrument executed by Innocencio Romero, February 10, 1853, were all, or any of them, inconsistent with the theory of a partition of the grant in 1847 or 1848.

16th. Error in holding that the said partition between the three Romero brothers in 1847 or 1848 was only a temporary arrangement entered into for convenience, and not intended to divest any of them of their undivided interest in the grant; that same could not bind the parties joining in the petition for confirmation, or that this, if true, would be material in this proceeding.

17th. Error in citing the several conveyances of the land here in question made under the grant title, after the passage of the Act of July 23, 1866, as evidencing an expectation that a right of purchase might be secured under that Act; and in considering such expectation, if it existed, as in any way impairing the good faith of the respective purchasers, or the right of entry of the present claimant.

18. Error in failing to consider and cite the fact that by the conveyances of the grant title to Martin Clark, executed March 24, 1869, and April 1, 1869, said Clark took such title in trust for the present claimant, Joseph Naphtaly, as shown by a declaration of trust, executed by said Clark November 8, 1871.

19th. Error in considering the assertion of claims to

the land in question by parties other than those holding under the grant title, since the passage of the Act of 1866, as in any way indicating that the claim of Naphtaly was uncertain, indefinite, and, in regard to its limits, disputed.

20th. Error in holding it to satisfactorily appear from the evidence that no right of purchase of the tract in question was conferred on any person by the Act of 1866, and that Naphtaly acquired no such right as the Act contemplates.

21st. Error in holding, in view of the remedial provisions of the said 7th section, Act of 1866, that the price paid by the respective purchasers of the land in question under the grant title as shown by the several deeds, was only a reasonable price for the possession of the claim, and in considering, as material in the case in any way except as evidencing his possession, the fact that Naphtaly had received rent, in any amount, for the premises held by him.

22d. Error in rejecting the claim of Naphtaly upon grounds not suggested in the decision of the Commissioner, and not raised in argument, as to which he therefore had no notice, and without opportunity to him to be heard thereon.

23d. Error in other matters, both of fact and of law, and in rejecting the application of said Naphtaly to enter the land claimed by him under the said 7th section, Act of 1866.

And the said Joseph Naphtaly, by his said attorneys, further moves that this motion and the said matters be set for argument before the Hon. Secretary of the Interior at such future time as the parties in interest herein may by stipulation, subject to the approval of the Hon. Secretary of the Interior, agree upon, or, in default of such stipulation and agreement, then at such time as may

suit the convenience of the Hon. Secretary of the Interior, and upon due notice to the parties in interest.

CURTIS & BURDETT,
BRITTON & GRAY,
Attys. for Joseph Naphtaly.

WASHINGTON, D. C., *March 1st*, 1889.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

H. J. Gray, of the firm of Britton & Gray, one of the attorneys for said Joseph Naphtaly in the above-entitled matter, being duly sworn, deposes and says: That the foregoing motion for review and reconsideration and for reargument of the said case is made in good faith, and is not for the purpose of embarrassment or delay.

H. J. GRAY.

Subscribed and sworn to before me this 1st day of March, A. D. 1889.

ROBINSON WHITE,
Notary Public.

APPENDIX.

RIGHT OF PURCHASE UNDER SECTION 7, ACT OF JULY 23, 1866.

NAPHTALY *v.* BREGARD ET AL.

The right of purchase conferred by the seventh section of the act of July 23, 1866, is subject to the following conditions: (1) the claimant must have purchased the land from Mexican grantees or assigns; (2) the purchase must have been made in good faith and for a valuable consideration; (3) the claimant must have used, improved, and continued in the actual possession of the land according to the lines of original purchase; and (4) no valid adverse right or title, except that of the United States, should exist.

A purchaser in good faith is one who purchases in the sincere belief that he is acquiring a good title to the land purchased, and who is not chargeable with notice of defects in the title, which may operate to defeat it, or with knowledge that he purchases only a speculative title.

The right of purchase conferred by said section does not relate back to former claimants, but extends only to persons then holding lands which they had purchased in good faith, and for a valuable consideration before the rejection of the grant, and who had used the land so purchased, improved it, and continued in the actual possession thereof within defined limits, from the time of their purchase to the date of the act.

The preferred right of purchase from the government is conferred only upon one who has purchased from Mexican grantees or assigns a definite tract of land, or such a tract as may be defined by the terms of the grant. The conveyance of an undivided interest, in the absence of evidence showing partition or actual occupation within definite limits, will not carry with it the right of purchase.

Secretary Vilas to Commissioner Stockslager, February 4, 1889.

I have before me on appeal from the decision of your office, dated March 2, 1887, the case of Joseph Naphtaly *v.* L. L. Bregard and others, involving the question of Naphtaly's right to purchase under section seven, act of July 23, 1866, some twenty-one described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., California.

The township plats of survey for said townships were filed in the local office on July 30, 1878, for township one south, and on October 5, 1878, for township one north. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883.

Naphtaly filed his application to purchase August 10, 1883. Mary A. Jones—one of the defendants herein—on July 16, 1883, applied to purchase under the same act, a portion of the land included in Naphtaly's application. The right to purchase is based on an alleged Mexican grant to three brothers, Innocencio, Jose, and Mariano Romero.

Naphtaly claims title under Innocencio Romero and Mrs. Jones under Jose Romero.

These applications to purchase are resisted by divers parties who assert rights under the timber-culture and settlement laws and by the Western Pacific Railroad Company.

Mary A. Jones, in addition to claiming a right to purchase under said act, claims a certain part of the land in controversy under the homestead laws. She alleges settlement in 1866 and continuous residence since that time on the land claimed as a homestead. Some of the other defendants allege settlement in 1875, and final certificates

have been obtained in several cases of soldiers additional homestead entries. Some of the defendants are simply applicants to file or enter, while others have tendered final proof and claim compliance with the settlement laws and the right to final certificates.

The land involved is within the twenty-mile limit of the reservation of January 30, 1865, for the Western Pacific Railroad, and the greater part of sections nine and fifteen is within the Highley survey of the Moraga grant.

The local office decided that the odd sections and parts of odd sections involved herein, and not included within said survey, belonged to the railroad; and that Naphtaly was entitled to purchase under the provisions of said act, the balance of the land described in his application. The decision of your office reverses the decision of the local officers, rejects the applications to purchase, and leaves the questions as to the rights of the Western Pacific Railroad and other claimants to future adjudication.

Naphtaly, Mary A. Jones, and the heirs of John M. Jones, deceased, have appealed.

The application of Mary A. Jones, widow and devisee of John M. Jones, deceased, may properly be considered in this case, as she has submitted evidence herein in support of her supposed right to purchase under said act a certain portion of said tract claimed by Naphtaly. The homestead claim of said Mary A. Jones, and the various claims of the other numerous defendants herein, are considered only so far as they affect the claimed right of said applicants to purchase under the act of July 23, 1866. So far as said various claims for different portions of the land involved conflict with each other, they have not been and will not be considered herein.

The claim of each of the applicants is based on the same alleged Mexican grant, and are so alike in some of their

essential features that the conclusion reached in the Naphtaly case disposes of the case of Mrs. Jones.

The seventh section of the act of July 23, 1866 (14 Stat., 218), is as follows :

"That where persons in good faith and for a valuable "consideration have purchased lands from Mexican "grantees or assigns, which grants have subsequently "been rejected, or where the lands so purchased have "been excluded from the final survey of any Mexican "grant, and have used, improved, and continued in the "actual possession of the same as according to the lines "of their original purchase, and where no valid adverse "right or title (except of the United States) exists, such "purchaser may purchase the same, etc."

Said applications were rejected by your predecessor in office, on the ground, (1) That there was no grant or semblance of a grant by Governor Micheltorena to the Romeros as claimed, and consequently, that appellants were not purchasers in good faith "from Mexican grantees or assigns." And (2) That the act only applies to parties who purchased prior to the rejection of the supposed Mexican grant, and that as Naphtaly admittedly purchased long subsequent to the final rejection of the Romero brothers alleged grant, he has not brought himself within said act.

Appellant, Naphtaly, by his counsel, insists that your office erred in so deciding, and claims that he has shown by the evidence in the case, (1) Such a grant, made in 1844 by Governor Micheltorena to the Romeros, as is intended by the term grant as used in said act. (2) A parol partition of the land so granted between the three brothers, some time in 1847 or 1848, and an allotment at that time of the land in controversy to Innocencio Romero. (3) The use, improvement, and continued actual possession in severalty by Innocencio Romero of the land so allotted to

him from the time of said partition up to December 26, 1853.

(4) The purchase of said land—excepting such portions as had been sold prior thereto—from said Innocencio on December 26, 1853, by Domingo Pujole and Francisco Sanjurjo in good faith and for a valuable consideration.

(5) The use, improvement, and continuous actual possession by said Pujole and Sanjurjo, of the land so purchased, by them, from the date of purchase, and according to the lines of their purchase, up to February 14, 1855.

(6) That on February 14, 1855, Pujole and Sanjurjo conveyed the same tract to James William Tice; that on August 18, 1855, said James William Tice conveyed the same to Andrew J. Tice; that on October 14, 1859, said Andrew J. Tice conveyed same to S. P. Millett, and that on October 17, 1860, said Millett conveyed same to the aforesaid James William Tice; and that the title remained in said James William Tice until long after the passage of said act of July 23, 1866—to wit, until April 1, 1869. And that each of said parties purchased said land in good faith and for a valuable consideration; and during the time they each held title, they each used, improved, and maintained the continuous actual possession of said tract of land according to the lines of their original purchase.

Assuming the foregoing facts to be proven, the applicant, Naphtaly, claims that James William Tice had, any time between July 23, 1866, and April 1, 1869—had said tract been subject to entry—the unquestioned preference right to purchase the same and that such right is assignable.

Naphtaly further claims that the evidence shows a complete chain of title from James William Tice to himself, and that he and each of the intermediate grantees pur-

chased in good faith and for a valuable consideration, and that each of said grantees, during the time they respectively held title to said tract of land, used, improved, and maintained a continuous actual possession of the same, and therefore that he has the preference right to purchase said tract under the act of July 23, 1866.

The documentary evidence produced in support of the Romero claim before the Board of Land Commissioners and the courts shows: A petition by claimants, dated January 18, 1844, to Micheltorena, then governor of California, for a tract of land described as the sobrante of the three ranchos of Moraga, Pacheco, and Will, situated in what is now Contra Costa county, California. A direction on the margin of said petition signed "Micheltorena" that the Secretary of State report, "having first taken such steps as he may deem necessary." A direction, signed Manuel Jimeno, to the alcalde of San Jose that he summon said Moraga, Pacheco and Will that they may be heard in the matter, and that he report; a report of the alcalde dated February 1, 1844, that the petitioners and said land owners "having been confronted, the latter said that the Senors Romero did not prejudice them in any way, but on the contrary that they desired them to be their neighbors . . . . It has also come to the knowledge of this tribunal that one Francisco Soto claimed the tract in question some six or seven years ago. But in this time he has neither used nor cultivated it in any way to gain any right thereto. Wherefore the petitioners appear to me entitled to the favor they ask." A report by the Secretary of State to the governor dated February 4, 1844, that "it would seem there is no obstacle to making the grant . . . if your excellency approves of it." A direction by the governor (February 28, 1844,) that the land be measured in the presence of the adjacent pro-

rietors and the result certified "so that it may be granted o the petitioners." A second petition by the Romeros, ated March 21, 1844, in which it is represented that the oregoing order had not been executed "for the reason hat the owners of the neighboring lands . . . . were bsent and engaged," and asking that the said grant be nade "either provisionally or in such a manner as your xcellency shall deem fit." A recommendation by the ecretary of State (Jimeno) as follows: "I think Y. E.'s rder should be carried into effect in regard to the measur- ng of the land that is claimed, and as soon as this is ac- omplished, with the least practicable delay, Senor Romero an present himself joined with Senor Soto, who says that e has a right to the same tract. Your Excellency's uperior discernment will determine what is best." This ecommendation is dated March 23, 1844, and on it appears he following: "Let everything be done agreeably to the oregoing report." "Micheltorena."

The Mexican archives do not show that any further steps ere taken in the matter by the Romeros, but parol testi- nony was produced in the prosecution of their claim be- ore the United States courts tending to show that in fact grant as asked had been issued to them by Governor Micheltorena.

The Romero claim was presented to said Board on February 28, 1853, and rejected on April 17, 1855. It was ubsequently rejected by the United States district and ircuit courts, and finally, at the December term, 1863, by he supreme court (Romero *v.* United States, 1 Wall., 21). These decisions were all made on the ground that he supposed grant was never issued.

In order to the enjoyment of the right of purchase under he act of 1866, it is necessary that the claimants of the re-emptive right should first have purchased the lands

from Mexican grantees or assigns; secondly, that such purchase should have been made both in good faith *and* for a valuable consideration; thirdly, that they should have used, improved and *continued* in the actual possession of the same *as according to the lines of their original purchase;* and fourthly, that no valid adverse right or title (except of the United States) should exist.

The supreme court have determined that there was no Mexican grant to the Romeros, and the Commissioner, therefore, held that the Romeros were not Mexican grantees. In view, however, of the fact that this is a remedial act, designed for the protection of parties who supposed they were buying a good title from a Mexican grantee, I am not prepared to hold that, if the other conditions exist, this is such a case as would deny the right upon this ground alone. An examination of the report of the decision of the supreme court shows that a grant was claimed to exist upon the testimony of witnesses who were intelligent and skilful in the law and affirmed that they had seen such a grant in due compliance with Mexican law and usage. I am disposed rather to place the affirmance of the Commissioner's decision upon other grounds, in respect to which the fact finally decided by the supreme court is of consequence as a matter of evidence upon the question of good faith.

It seems to me impossible to hold that at the time of the passage of the act of 1866 there was any person entitled to the pre-emptive right as a purchaser in good faith who had used, improved and continued in the actual possession of specific land as according to the lines of the original purchase.

A purchaser in good faith is one who purchases in the sincere and fair belief that he is acquiring a good title to the land purchased, and who is chargeable with no notice

defects in that title which may operate to defeat it, and pecially one who is not chargeable with knowledge that purchases only a speculative title. The facts of this e, especially when taken in connection with the final cision that there was no grant at all, repel the presumption that this belief could have been entertained by the ginal purchasers from Innocencio Romero. No conyance had been made at the time when the petition to Board of Land Commissioners for confirmation of the eged grant was presented, which was on the 28th of bruary, 1853. The first conveyance upon which this erest is founded was t Innocencio Romero and wife, Domingo Pujole and I ncisco Sanjurjo. The conveyce from Romero and w. e to these parties was made on e 26th of December, 1853, ten months substantially, er the petition for confirmation was presented, and it ows upon its face that the parties understood that they re purchasing a title which was *sub judice* and which s speculative. I quote from the deed the material rts, as follows:

" *Witnesseth*, That the said parties of the first part for, nd in consideration of the sum of ($5,325) five thousand three hundred and twenty-five dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, ... have granted, etc., and by these presents do grant, bargain, sell, release, remise and convey unto the said parties of the second part, and to their heirs and assigns forever, all the *undivided one third* of the lands and ranchos in said Contra Costa county and State aforesaid, being the said lands and rancho granted to the party of the first part and his two brothers, Jose Romero and Mariano Romero, by Governor Micheltorena in the year 1844, and being also the same lands and rancho the claim for which is now numbered six hundred and fifty-six on the docket of the Board of the United States Land Commis-

" sioners appointed to ascertain and settle private land " claims in California, reference being had to the papers " and proofs on file in said case for a more particular de- " scription of the lands and premises hereby intended to " be conveyed.

" And it is expressly understood and reserved by the " parties of the first part and assented to and agreed to by " the parties of the second part, that in the event that said " lands and rancho shall hereafter be confirmed by said " Board of United States Land Commissioners, then the " said parties of the second part, their heirs and assigns " shall pay to the parties of the first part the further con- " sideration of ($3,000) three thousand dollars."

No covenants of warranty for the title were contained in the deed.

On the 14th of February, 1855, Pujole and Sanjurjo made a deed to James William Tice which, except that the express consideration was eight thousand dollars instead of five thousand three hundred and twenty-five dollars, is in all essential particulars the same as the foregoing, and carries upon its face the same evidence that a speculative title was the subject of the transfer.

In the technical sense of the law, the consideration was "valuable" because it was of money. But, as affecting the question of good faith, it appears from the evidence that the consideration was not truly stated in the deed, and was very much smaller, so far as it was a considera- tion for the land at all. It does not disclose how much of the real consideration was for the landed interest, but it does appear that it was quite insignificant. Innocencio Romero says he "sold land, cattle and horses." Ignacio Sybrian says that land "together with all the cattle and horses" was sold. Manuel Sybrian says that Romero sold the "land, cattle, horses, houses, and everything there was upon the ranch." This testimony was all introduced by

the applicant Naphtaly. John A. White, a witness introduced on the part of defendants, says that he and James M. Tice, who is shown by the evidence to have been the father of the said James William, were associated in business in the spring of 1855, under the firm name of Tice and White; that the firm bought of Purjole and Sanjurjo the Romero ranch, together with about one hundred head of cattle, one hundred head of horses, and sheep, and a few goats; that the consideration was placed nominally at eight thousand dollars, but did not in fact exceed three thousand five hundred dollars; that the stock was estimated to be worth the money paid, or perhaps a little less, and that not much value was put on the land; that he occupied the land for two or three days, had some trouble with James M. Tice and told him he could have the land, and that the land was conveyed to James William Tice, who was then over twenty-one years of age. There is no impeachment of the witness or contradiction of his testimony. At the time this purchase was made the claim had been nearly two years pending before the Board of Land Commissioners, presumably the evidence had been submitted and the risk of the result must have been apparent. But three days over two months passed when, on the 17th of April, 1855, the Board refused confirmation of the grant.

Subsequent to the rejection of the grant, James William Tice conveyed to Andrew J. Tice, August 8, 1855, by a deed in substantially the same terms as that already quoted, the nominal consideration expressed being eight thousand dollars.

After that the claim was considered by the district court and the circuit court of the United States and rejected by both. With these further evidences of the invalidity of the claim, the next conveyance was made for the considera-

tion nominally, of one thousand dollars only, by Andrew J. Tice to Solomon P. Millett on the 17th of October, 1859, with the reservation of one hundred and sixty acres described by metes and bounds, on which the grantor and his family were said to reside.

On the 13th of December, 1860, Millett for the same expressed consideration conveyed the same interest back to James William Tice.

Finally, on the 6th of April, 1861, James William Tice conveyed the interest derived by his deed from Millett to Urhetta Tice, his mother, for the consideration of love and affection and her better support and maintenance. This appears to be the last conveyance before the passage of the act of 1866. So far as disclosed by the proofs, whatever right of purchase was given by the act of 1866 if any, it carried to Urhetta Tice as the then holder of this claim.

I think it a clear interpretation of the act of 1866, that it had no relation back to any former claimants, but gave the pre-emptive right only to persons then holding lands which they had purchased in good faith and for a valuable consideration, before the rejection of the grant, and when they had used the land so purchased, improved it and continued in the actual possession of it within defined limits from the time of their purchase to the date of the act.

It thus appears that Urhetta Tice had not purchased it for a valuable consideration, technically speaking, but only for a "good" consideration; that she purchased, so far as the conveyance to her can be called a purchase, after the grant had been rejected by the Board of Land Commissioners, by the district court, and by the supreme court of the United States, and while the case was depending upon appeal in the supreme court. If the conveyance to her were for a valuable consideration, it could not, under these circumstances, be held to be also made in that "good

faith" which the law contemplated. It had been from the beginning a merely speculative title, and every deed from the original alleged Mexican grantee had carried upon its face notice of the defect and of the contingency, and charged the purchaser with an additional payment if the contingency eventuated favorably. The consideration paid, even in the earlier purchases, was not for the land, to any sensible degree, but for stock, with the privileges of a cattle range, which the claim of the grant afforded to the holder.

Besides these defects, the case does not meet the third condition of the law. That evidently contemplated the purchase of a definite tract of land, or at least of a tract capable of definition from the terms of the grant. This was the conveyance of the undivided interest only, and from the circumstances hereafter detailed, it is evident that there was nothing like definite understanding of a tract of land as conveyed, or which the parties could possess, according to the lines of their original purchase." Accordingly, it is manifest from the testimony and history of the case that there was no such thing as a well defined tract of land which the parties could claim to have been fairly conveyed as upon a perfect title; and it appears from the various claims which have been established upon this land that there was no such thing as an exclusive possession, according to the lines of an original grant. The possession appears to have been doubtful and contested to a greater or less degree, and especially the boundaries were indefinite and uncertain.

The evidence shows that the alleged Romero grant had no known or fixed boundaries, and that the quantity of land included therein was necessarily indefinite. What the sobrante or surplus claimed might prove to be could only be determined by a survey of the ranchos named in

the Romero petition, and by having their boundary lines definitely fixed, and no such survey or fixing of lines appears to have been made under Mexican authority, nor until the grants for said rancho were finally confirmed by the United States government. Innocencio Romero claimed that the grant was for from four and a half to five leagues of land, and that from a league and a half to two leagues of the granted lands were allotted to him in severalty by his brothers at the time of the alleged partition in 1847 or 1848. This would make from about six thousand to about eight thousand acres allotted to Innocencio Romero in and by said partition. Naphtaly says he bought about three thousand acres of this alleged allotment. The deed to Domingo Pujole and Sanjurjo as we have seen, was for an undivided third interest in the lands alleged to have been granted to the Romero brothers, and Innocencio says it conveyed the same land allotted to him "except " some small parcels within the exterior lines which I had " sold to others before." The subsequent intervening conveyances down to and including the conveyance to Naphtaly are for an undivided one-third interest in the Romero grant, and under the theory that the deed to Pujole and Sanjurjo vested the entire title of Innocencio to lands held in severalty by him, each of the subsequent purchasers took the same quantity and by the same lines as the original purchasers. They would, therefore, to bring themselves within the statute, be required to show use, occupation, and the continued actual possession of the land so conveyed according to the lines of Pujole and Sanjurjo's purchase. This the evidence does not show. Naphtaly says he claims probably two or three thousand acres; that his purchase included three hundred and fifty-seven acres of the San Ramon, and that the houses, barns, and buildings are on the San Ramon grant. The San Ramon, it

appears from the evidence, was a confirmed Mexican grant, lying on the east and northeast of the land in controversy, for which a patent issued April 7, 1866.

It appears in evidence also that the west line of the tract claimed to have been purchased by Pujole and Sanjurjo has been moved in and further east than it was at the date of said purchase. How far this line has been moved in since that time does not appear, but one of Naphtaly's witnesses says that the land claimed by him is a great deal less than the Tices (who purchased in February, 1855), took possession of.

The evidence taken altogether clearly shows that possession of the land claimed to have been conveyed to Pujole and Sanjurjo, and from them through intermediate conveyances to Naphtaly, has not been continuously maintained by him and his immediate and more remote grantors, according to the lines of the Pujole and Sanjurjo purchase as such lines are claimed to have been pointed out and designated by said Innocencio at the time said conveyance was made.

No documentary evidence of any character is produced to show, or which tends to show, that this claimed grant of unknown boundaries, was ever partitioned by the Romero brothers. Nor is it pretended that at the time of the alleged partition any lines of survey were run, or any permanent monuments erected, or any artificial marks of any kind made to show the lines separating the lands of one brother from those of the other brothers. That co-tenants who did not know the boundary lines of their joint property, nor its area in leagues or acres, and who were liable to have their portions allotted in lands to which they had no title, should meet together and divide the joint property among themselves and by such division each divest himself absolutely of all title to such property, except as to

the portion allotted to himself, is so contrary to our experience and observation as to how men usually act in matters of such importance to themselves as to render the alleged fact highly improbable. To gain credit, therefore the fact alleged should be clearly proven by the most satisfactory evidence, and the evidence in support of the alleged partition, after careful consideration, is found to be weak and unsatisfactory. The testimony of only two persons who profess to have been present at the time of the alleged partition is offered in evidence—to wit, Innocencio Romero and Ignacio Sybrian. Romero says that he and his brothers made an absolute partition of the land granted to them some time in 1847 or 1848; that he took the westerly portion, Jose the easterly, and Mariano the north-easterly, and that the ridges and arroyos were selected as boundaries; that he occupied the land until he sold to Pujole and Sanjurjo in Dec., 1853, and that his brothers went to live on their own land, and sold their portions as he did his.

Sybrian testifies that he was present at the time the partition was made, that Innocencio was then in possession; that his brothers visited him occasionally and that there was no house on the land but Innocencio's and that no one else built a house on the land; that Mariano lived in Monterey, Jose in San Jose, and that neither lived on the ranch; that neither of them had a house, and that he does not believe either of them occupied any portion of the ranch after the division; heard they had sold, and that Ramon Pico lived on Mariano's part and Otoyo on Jose's, and that the division was made into three parts, without survey, by designating natural objects.

These two witnesses agree substantially on the natural objects which marked the lines of the tract alleged to have been allotted to Innocencio; and Sybrian says that the lines shown to Pujole at the time of the sale to him and

Sanjurjo were the same, except that some land had been previously sold by Innocencio.

A number of witnesses testify that they heard of this partition and that it was recognized by the parties and by the neighbors. That Innocencio's right to the possession of all the land alleged to have been allotted to him was not recognized by all the neighbors is clearly shown. It will be observed too that Innocencio Romero and Sybrian contradict each other as to the important fact about Jose and Mariano taking formal possession of, and going to live on, their respective portions; and Romero is flatly contradicted by the weight of the testimony as to the location of Mariano's portion. The testimony satisfactorily shows that from 1846 to 1852 Jose lived at the mission of San Jose, and that he was what some of the witnesses called a major-domo of the mission. In an affidavit offered in evidence, Mariano swears that between 1844 and 1852 he had never seen his brother Innocencio. In addition to this, all the documentary evidence is utterly inconsistent with the theory that there was an absolute partition of the land claimed by the Romero brothers. All of the deeds to this land made by Innocencio were for an undivided interest. The deeds made by the other brothers were also for undivided interests. Innocencio and Jose Romero, Francisco Otoyo, Alvin Campbell, James Thompson, William Mitchell, John M. Jones, C. Yeager and Miguel Garcia were the parties who presented the petition for the confirmation of the alleged Romero grant to the Board of Land Commissioners and they all represented that they held undivided interests therein, Innocencio Romero claiming an undivided third interest.

The evidence satisfactorily shows that the following instrument was executed on the day it purports to have been, that the signature thereto is the genuine signature of the said Innocencio Romero—to wit:

"MARTENEZ, CONTRA COSTA CO.,
"*February* 10, 1853.

"I, Innocencio Romero agree that in the division and "partition of the Sobrante grant or claim, claimed and "owned by myself, Garcia, Otoyo, Thompson, Mitchell, "Jones and Yeager, that the land heretofore granted by "me to Robert N. Wood by deed duly of record, shall "be partitioned off and allotted to me in said division "first in order after my homestead of one hundred and "sixty acres.

"Given under my hand and seal the day and date "above written.

"INNOCENCIO his × mark ROMERO.

"Witness:

"EDWARD WILLIAM GRAHAM."

The deed referred to was executed October 16, 1852, and conveys to said Wood by metes and bounds, a certain portion of the alleged Romero grant, and the parties named by Innocencio as owners of said grant with him, claimed under Jose in said petition for the confirmation of the grant.

If there was ever any kind of a partition of the land claimed by the Romero brothers between them, it appears clear to my mind that it was only a temporary arrangement entered into for convenience and not intended to divest any of them of their undivided interest in the alleged grant. It certainly could not bind the parties joining in the petition for the confirmation of said grant.

When the act of 1866 was passed it would appear that some new vitality was given to the claim by virtue of the expectation that a right of purchase might be secured under that act, and on the 13th of May, 1868, there appears a deed from Urhetta Tice, James W. Tice, Andrew J. Tice, and Solomon P. Millett and wife, to

David P. Smith, which, for a consideration of seven thousand dollars, purported to convey the interest of the first parties in sections 2, 3, 4, 9, 10, 11, 14, 15 and 16, Township 1, South, Range 2, West, M. D. M., describing the land by metes and bounds, and stated to be supposed to contain 1,767.86 acres; to which is added

"*Also*, all of the lands, of which the foregoing are "supposed to be all or a part, included within the "boundaries of a certain claim formerly known as the "Romero, supposed to have been granted in the year "1844 by Micheltorena, Governor of California, to "Innocencio, Jose, and Mariano Romero, which was "presented for confirmation to the United States Land "Commissioners . . . . . and was afterwards "rejected. There is expressly excepted from the land "conveyed by this instrument as follows: One hundred "and sixty acres now or formerly owned, or claimed and "occupied as a homestead, by the said Andrew Jackson "Tice, and supposed to be the S. W. ¼ of Sec. 3, afore-"said. Together with all and singular the tenements, "rights, privileges and appurtenances thereto belonging, "including the interest and rights of each and every one "of said parties of the first part as pre-emptors or settlers "or otherwise, and all the benefits that have been or are "to be derived under any and all acts of the Congress of "the United States."

On the 25th of February, 1869, David P. Smith conveyed the same lands to John R. Spring, for a stated consideration of five hundred dollars. On the 24th of March in the same year, Spring conveyed to Martin Clark, for a stated consideration of four thousand five hundred dollars; and on the 15th of May, 1876, Martin Clark conveyed the same to Joseph Naphtaly, for a stated consideration of five dollars.

Meantime, the various claims of other parties to this suit had attached in different ways, all indicating that the

nature of the claim of Naphtaly was uncertain, indefinite, and at least in regard to its limits, disputed.

Admitting that the right of purchase given by the act of 1866 could be transferred, it appears satisfactory from the evidence that no right of purchase of this tract was conferred on anybody by that act, and that Naphtaly acquired by the conveyances described no such right as the act contemplates.

It is not a matter furnishing any special evidence of good faith that a price was paid for the possession of the claim and such of the land as has been occupied under it. The possession of it as a mere claim appears to have been of sufficient value to warrant the payment of the consideration mentioned in any deed, or so far as disclosed in fact, of any transfer, to the extent that possession has been maintained. It is shown that Naphtaly has received in rent for so much of the premises as he held possession of, for a part of the time twenty-five hundred dollars a year, and for the remainder two thousand dollars a year. To those acquainted with the country, the value of the possession of such a claim is sufficiently well known to account for all the money that appears to have been in any case paid for it.

The same considerations which relate to Naphtaly deny the right of Mary A. Jones to her claim of purchase under the act.

Your decision rejecting the application is affirmed.

MEXICAN PRIVATE CLAIM—ACT OF JULY 23, 1866.

NAPHTALY *v.* BREGARD ET AL.

ON REVIEW.

Under a parol partition of a Mexican grant, in which each party thereto holds undisturbed possession according to the lines of such partition, and sells and conveys the lands thus received, the grantee of such Mexican claimant acquires the right of purchase under section 7, act of July 23, 1866, so far as the question of definite boundaries is concerned, even though in the instrument of transfer said lands are described as an undivided interest.

A hearing directed to determine the character of the title held by the grantee of the Mexican claimant at the date of the passage of said act.

Acting Secretary Chandler to the Commissioner of the General Land Office, June 23, 1891.

I have considered the motion for review of departmental decision of February 4, 1889, in the case of Joseph Naphtaly *v.* L. L. Bregard *et al.* (8 L. D. 144), involving the question of Naphtaly's right to purchase under section seven of the act of July 23, 1866, certain described tracts of land in T. 1 N., and T. 1 S., R. 2 W., M. D. M., San Francisco, California.

After a lengthy trial, during which much testimony was taken, the local officers rendered a decision in which they rejected the pre-emption and homestead claims of Bregard *et al.*, awarded certain tracts to the Central Pacific Railroad Company, successors to the Western Pacific Railroad Company, and recognized the right of Naphtaly

to purchase the balance of the land embraced in his application.

Your office rejected the application of Naphtaly to purchase on the ground (1) that there was no grant to the Romeros under whom Naphtaly claimed, and consequently, that he was not a purchaser from a "Mexican grantee or assign," and (2) that the act only applied to parties who purchased prior to the rejection of the supposed Mexicant grant, and as Naphtaly purchased subsequent to the final rejection of the alleged Romero grant, he was not within the statute. My predecessor, Secretary Vilas, overruled your office on both these points, but he rejected the application to purchase principally on the ground that at the date of the passage of the act July 23, 1866, no person possessed the qualifications of a purchaser under said act, and that Naphtaly acquired by conveyance no such right as the act contemplates. This conclusion was based upon the fact that at the date of the passage of the act, the title to the tract in question was in Uhretta Tice, and that she was not a purchaser for a valuable consideration for the reason that said land was conveyed to her by her son for the consideration of love and affection and her better support, maintenance and protection. My predecessor also found as a matter of fact, that the purchase from the Mexican grantee, was not in good faith, and was not for a specific and well defined tract of land.

In the motion for review numerous grounds of error are assigned both in the findings of matter of fact and of law.

Section seven of the act of July 23, 1866 (14 Stat. 218), under which Naphtaly makes application to purchase provides—

"That where persons in good faith and for a valuable "consideration, have purchased lands from Mexican gran- "tees or assigns, which grants have subsequently been "rejected . . . . . and have used, improved, and con- "tinued in the actual possession of the same as accord- "ing to the lines of their original purchase, and where "no valid adverse right or title (except of the United "States) exists, such purchaser may purchase the same."

I do not deem it necessary to give in detail the history of the Romero grant. Application was made to the Mexican governor of California in 1844, by three brothers, Innocencio, Mariano and Jose Romero, for a grant of land. Certain proceedings, usual in such cases, were had looking to the granting of the request. The brothers went into possession of the tract petitioned for, occupied the same for years, and finally sold it, the different brothers disposing of different portions of the entire tract.

On December 26, 1853, Innocencio Romero and his wife sold to Domingo Pujol and Francisco Sanjurjo

"all the undivided one-third of the lands and rancho in "said Contra Costa county and state aforesaid, being the "said lands and rancho granted to the parties of the first "part and his two brothers, Jose Romero and Mariano "Romero, by Governor Micheltorena in the year 1844 "etc."

It is alleged that there was a partition of this grant between the three brothers in the year 1846, 1847 or 1848, and that the tract sold by Innocencio was the portion set off to him. This partition is denied by Bregard *et al.* Some contradictory evidence is submitted on this point, but in my opinion, the great preponderance of evidence is to the effect that such a partition was actually agreed upon and made by the brothers.

The testimony of Innocencio Romero and other wit-

nesses, taken in 1875 by order of the judge of San Francisco county is positive. Romero testified that he, his brothers, Ignacio Sybrian, and his little son, rode over the land and "divided some of the land between us three," that they marked the boundaries and lines of each brother's piece, the well known points of land, the ridge and arroyos were selected as boundaries, that he took the westerly portion, Jose took the easterly portion and Marianc the northeasterly portion.

Ignacio Sybrian testified that he was present with the three brothers when they divided the grant among themselves in the year 1847 or 1848, that the lines of each portion were established and pointed out and each of the brothers occupied the portion set off to him and sold the same, and the right of each brother to the portion set apart was recognized by all, that the tract sold to Pujol and Sanjurjo was the portion set apart to Innocencio. At the hearing before the local officers the same witness testified to substantially the same facts, that Innocencio took his portion to the west, Mariano on the east, and Jose on the north or northeast.

Manuel Sybrian testified that he had known the land since 1850, that he was present when Innocencio Romero delivered possession of the land he had sold to Pujol, that he delivered possession of what was then called the Innocencio Romero ranch, and in describing the tract of which possession was given, he recites the same boundaries as were given by Innocencio Romero and Ignacio Sybrian in describing the portion set apart to the former.

Samuel S. Kendall testified that he was living on a portion of the land in dispute in 1852 in a cabin, that Romero in company with Moraga came to his cabin and told him that he was on his land, and at that time in the presence of Moraga described to him the boundaries of his claim,

and in reciting these boundaries the witness gave in substance the boundaries above mentioned as given by Romero and Ignacio Sybrian, and he asserts that no one was in possession of said tract except Romero.

Jose Ramon Pico testified that he was acquainted with the Romero brothers and with the land in 1844 or 1845, that the grant was divided between the three brothers some time after 1845, that his father purchased the portion that was allotted to Mariano in 1851, viz., the southeastern portion of the grant, that Jose took the northeastern and Innocencio the northwestern portion.

D. P. Smith, a witness, and also associate counsel for Bregard *et al.* in the present case, was a witness before the local office in the case of Hyatt *v.* Smith on May 12, 1870. His evidence given at that time, has been made a part of the record in this case. He purchased in 1853 a portion of the tract which had been allotted to Jose, and he states that he knew from Innocencio Romero, and from other purchasers, that the ranch had been divided, that "Innocencio and Mariano had the south part of the valley, Jose had the north part or the northeast part."

On December 19, 1882, my predecessor rendered a decision in the case of Hyatt *v.* Smith, in which it was said "evidence established the fact that a parol partition of "the tract was made between the three brothers and that "Innocencio and Mariano took one part and Jose an-"other."

Counsel assert that the evidence of partition in the case of Hyatt *v.* Smith and the present case is irreconcilable, either that the evidence in the former case is untrue or that in the present case. I do not think such a conclusion follows. Smith the principal witness in the former case testified as above recited; the fact sought to be established in the case then under consideration was that a

portion of the grant had been allotted to Jose and my predecessor so found, but it does not follow that his finding was that neither Innocencio nor Mariano had a portion allotted to them.

Counsel for Naphtaly file certain affidavits with their argument in support of the motion for review.

One made May 14, 1889, by Jose Joaquin Romero, who states that he is fifty-nine years of age, and is the son of Innocencio Romero, that he knew that his uncles and his father divided the grant between themselves, that to his father came the piece of land lying south of Walnut Creek east of the Chuchilla de las Trampas and the eastern boundary of the land was the range of hills that run south from the hill near his father's house. (This is the same description of the tract in substance as is given by the other witnesses to the partition). He further states that his father was in the exclusive possession of this land after the division between himself and his brothers, that Jose's land was east of his father's, and Mariano's about southeast, that his uncles sold their portion, that "they were friendly with us and until we moved from the "ranch in 1853, or 1854, they very frequently visited us in "the adobe house on the ranch. I knew old Mr. Tice very "well, the land I refer to was once held by him and his "sons. My father died in 1878."

N. B. Smith made affidavit June 4, 1889, as follows:

"I reside in Contra Costa county where I have lived "since 1846. In the year 1850 or 1851, I bought from "Innocencio Romero, a tract of land in Contra Costa "county, of what was then supposed to be a part of what "was known as the 'Romero Grant,' at that time and for "years before it was believed that the three brothers "Romero had obtained from the Mexican authorities, a "grant of about five leagues, situated near the Moraga

" ranch, on the east of it. When I bought from Inno-
" cencio, I bought a segregated parcel of land near Wal-
" nut Creek, I took a deed from Innocencio only because
" it was notorious in the neighborhood, and I had been
" told by both Innocencio and Jose Romero, whom I
" knew very well, that the three brothers Romero, who
" claimed to own the grant, had divided the land which
" they took possession of under the grant among them-
" selves, and that the part I was then buying had fallen
" to Innocencio and that his two brothers had no interest
" in it. I was also informed that Innocencio's part was the
" tract of land lying south of Walnut Creek, east of the
" Maraga and west of a range of hills that is nearest to
" the Alamo road, and south near Sugar Loaf canon. I
" knew the two Spaniards to whom Innocencio sold what
" he had left of his part of the ranch. It was the same
" land that the Tices bought and was afterwards called
" the 'Tice' ranch.

" It was a common thing in the early times of California,
" before and after California was admitted in the Union,
" to divide lands held in common by the people going on
" the land and each selecting his share of the land. If I
" had not known from the Romero brothers that they had
" partitioned the land among themselves, and that Inno-
" cencio's share included the land I bought from him, I
" would have procured the deed of Jose and Mariano.
" I sold the land so bought from Innocencio and the per-
" son who purchased from me, took the same title that I
" had."

Victor Castro made affidavit April 16, 1889, that he was born in 1820, and resided in Contra Costa county since 1837, that he was intimately acquainted with the Romero brothers, that in 1844, they claimed a grant from Micheltorena, that it was known to those living near the Romero claim that the brothers had divided the land between themselves, this partition was notorious and it was respected by the neighbors, that he was well acquainted with the tract allotted to Innocencio, that Innocencio had

sold to different people lands within said tract and then sold what was left to the Spaniards in 1853 or 1854, that in the division Jose got the land lying east of Innocencio's, and Mariano's land was south and southeast, that during all the time from the division up to the date of sale to the Spaniards, neither of the brothers nor any other person claimed any title as against Innocencio; that he was in undisturbed possession of the land claimed by him.

These affidavits, while they could not be taken as evidence to change a finding justified by the evidence contained in the record, are cited merely as sustaining a conclusion which I think must be found from that record, viz., that a parol partition of the grant was made by the brothers and that each one was in undisturbed possession of the portion allotted to him, and sold and disposed of said portion.

There appears to be a discrepancy between the testimony of Innocencio Romero and the other witnesses to the partition, on one point, viz., he states that the portion allotted to Mariano was the northeast section of the grant, while the other witnesses establish the fact that the portion allotted to Mariano was the southeast section of the grant.

At the time Innocencio gave his testimony he was seventy years of age, it was thirty years after the partition, the testimony was given in Spanish and was submitted through an interpreter and the record shows that frequent mistakes were made in recording and transcribing the testimony, in view of these facts I do not think said discrepancy in the record should be regarded as casting discredit on the testimony of these witnesses, they agree in their statements in all essential particulars although the evidence was taken at different times and before different tribunals.

On February 14, 1855, Pujol and Sanjurjo conveyed the land in dispute to J. W. Tice. On August 18, 1855, J. W. Tice conveyed the premises to A. J. Tice. On October 17, 1859, A. J. Tice, conveyed to S. P. Millett, and on October 17, 1860, Millett conveyed to J. W. Tice. All of these transfers were based upon a valuable consideration, and the tract conveyed was the same as that delivered by Romero to Pujol and Sanjurjo, and by the latter to J. W. Tice.

On April 6, 1861, J. W. Tice conveyed the premises to Urhetta Tice and thus the title was in her at the date of the passage of the act of July 23, 1866.

It is asserted that the interest conveyed to Pujol and Sanjurjo was an undivided one-third of the lands granted to the Romero brothers, and that it was not a definite tract of land which the parties could possess according to the lines of their original purchase. The evidence is explicit that Romero delivered to his grantees the tract of land which he claimed was allotted to him in the partition, that he went with them and pointed out the lines of their possession, as he states of

" the same land which when my brothers divided was set
" aside as my part and which I have already described to
" you, except some small parcels within the exterior lines
" which I had sold to others before and told Pujol about."

This statement is confirmed by Sybrian who was present when the grantees were put in possession by Romero.

In reply to the question " why did you specify the land
" sold to Pujol as an undivided one-third ? " he answered,

" I did not write it, the grant lines were not fixed, and
" the grant was not divided by a surveyor or by a court,
" after we made the bargain I pointed out to Pujol the
" boundaries of my land and told him to draw a deed for

" the land. The land that I sold them was divided and " well defined. But I sold him a third of the grant, which " would amount to more than what Pujol took possession " of."

The Romero grant was a sobrante or surplus of land after the claim of surrounding grantees had been satisfied, hence at the date of partition it was impossible to tell just where the exterior lines of the grant were located, and for this reason Innocencio testified " that he and his " brothers divided some of the land " between them, but the evidence is clear that the portion divided was possessed and sold according to the lines of said division and I do not deem it necessary at this time to speculate as to how much land Pujol and Sanjurjo would have been entitled to, under their deed had they retained possession, and had the grant been confirmed, and for a greater quantity of land than was divided between the three brothers by boundaries the only question to be determined at this time is, did Romero sell a tract of land definite and specific as to boundaries? In my opinion the answer to this question must be in the affirmative.

The object of the statute under consideration was to afford relief to those who had used, improved, and continued in the actual possession of land purchased from supposed Mexican grantees.

The evidence is clear as to the tract intended to be purchased and the identity of said tract was not destroyed by the terms used in the instrument of transfer, viz., an undivided one-third of lands granted &c. Taylor *v.* Yates (10 L. D., 242). This was the tract conveyed to Tice by Pujol and Sanjurjo, and the title to the same was in Urhetta Tice on July 23, 1866, and was afterwards conveyed to Naphtaly and the evidence shows that all the purchasers from Pujol and Sanjurjo to Naphtaly main-

tained possession of said tract substantially according to the lines of the original purchase. It is asserted, however, that exclusive possession was not maintained by the different purchasers. It appears from the evidence that while a portion of the tract was cultivated, the greater portion was used for grazing purposes, that the tract was enclosed by fences and natural barriers, but that the stock of surrounding claimants would in certain seasons of the year intrude upon this enclosure, and also that the owners at times granted permission for cattle to graze on the land. It does not follow, however, that the claimants did not maintain possession of the tract in dispute and use it for the purpose for which it was best adapted. In the case of Dallas *v.* White (Copp's Land Owner, Vol. 5, p. 82), it was held after citing the case of Hyatt *v.* Smith, that it is sufficient under the act now under consideration, if the lands claimed are used for the purpose for which they are best adapted, without a fence or enclosure.

It is alleged that neither Pujol and Sanjurjol nor any of the subsequent holders purchased in good faith, that each purchased a speculative title.

In my opinion the record does not sustain this conclusion.

The evidence shows that the Romero brothers believed that they had a valid grant, and this opinion and belief was shared generally by their neighbors and associates, and the community. The holders of the title to the lands claimed to have been granted had purchased prior to the rejection of the grant by the supreme court and up to the date of the rejection by the final tribunal, there was at least, reasonable grounds for the belief that the grant would be confirmed. It was rejected both by the lower tribunals and by the supreme court for the reason that there was no record evidence that the grant had actually

issued by the Mexican Governor. There was, howev
parol evidence introduced which taken separately, creat
a strong presumption that the grant had issued.
this connection the court say (1 Wallace, 721) " taken se
" arately the parol evidence if competent, might possib
" justify a different conclusion," but taken in connecti
with the documentary evidence and when so considere
the conclusion was that no grant was issued by the go
ernor. If it required the careful analysis of the eviden
by able lawyers to determine the character of the gra
and the same was rejected for technical defects and n
for fraud or the want of good faith on the part of t
grantee, it is but reasonable to assume that the communi
at large were strong in the belief that the grant was a val
one and that the title purchased was a good one.

Attention is called to the fact that while the consider
tion named in the deed was $5,000, it was agreed a
stipulated between the parties that an additional $3,0
should be paid in the event of the confirmation of t
grant and this is cited in support of the conclusion th
the title purchased was a speculative one. I do not co
cur in this view. The facts as they existed at that tim
must be taken into account. It was well known that t
grant must be confirmed by a judicial tribunal, and th
it was essential that evidence of the grant should be pr
duced before that tribunal and the parties to produce th
evidence were the grantees themselves, and in order th
they might retain their interest in producing such eviden
it was but reasonable that increased consideration for t
property should be agreed upon in the event of the co
firmation of title, but it is not reasonable to assume th
the sum of $5,000 would be paid for a merely speculati
title.

Attention is called to the fact that parol eviden

shows that certain stock, horses, cattle, etc., passed with the land. The evidence, however, fails to show that the value of the stock amounted to any definite sum, nor is the record evidence overcome that a valuable money consideration was paid for the land by the grantees of Romero.

J. W. Tice was a purchaser for a valuable consideration from said grantees and he, on April 6, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support, maintenance and protection, and it is contended that while this is a good consideration, it is not a valuable consideration, and hence that at the date of the passage of the act of July 23, 1866, the title was not vested in one who was qualified to purchase under said act.

I think the evidence clearly shows that Urhetta Tice, if the deed to her is to be considered an absolute conveyance, was a purchaser in good faith; that she purchased from the assignee of a Mexican grantee; that the grant was rejected subsequent to the purchase, that she had used and improved the land and continued in actual possession of the same according to the lines of the original purchase and that there was no valid adverse claim to the land except that of the United States. In view, however, of the consideration expressed in the deed, can she be considered a purchaser for a valuable consideration, the additional qualification necessary in order to be a purchaser under the statute?

I have carefully examined the discussion of this act by Congress for the purpose of ascertaining whether or not it was intended that any specific class of considerations should move between the Mexican holder and his transferee, and in the brief argument which arose over the passage of the bill I find no mention thereof, and I very seriously

doubt whether Congress intended any more by this proviso than to prevent fraudulent or speculative transfers, hence it used the term, " valuable consideration," in its popular sense, rather than in its technical meaning and application. However, finding the words " valuable con- " sideration," in the section, the presumption of the law is that Congress used it in its well defined legal signification, hence the department in interpreting the same, must be governed by the definition thereof, as used in the books. Bouvier defines " valuable consideration " as

" One which confers some benefit upon the party by " whom the promise is made, or upon a third party at his " instance or request; or some detriment sustained, at " the instance of the party promising, by the party in " whose favor the promise is made; a valuable consider- " ation may consist either in some right, interest, profit, " or benefit accruing to one party, or some forbearance, " detriment, loss or responsibility given, suffered, or un- " dertaken by the other.

" Good considerations are those of blood, natural love " or affection, and the like. Motives of natural duty, " generosity, and prudence come under this class."

I think it may be laid down as a general rule, that a " good consideration " will pass the title and support the covenants of a deed and will be enforced both in law and in equity, *inter partes*, and in all cases where such conveyance is not to the prejudice of creditors, or in fraud of the rights of others than the parties to the conveyance itself.

The act in question is remedial in its nature and should be liberally construed.

" It has been held in the case of a remedial act that " everything is to be done in advancement of the remedy " that can be given consistently with any construction " that can be put upon it."

The consideration between the son J. W. Tice and the mother Urhetta Tice, for the transfer was good and vested the title in her, unless the inhibition in the statute intervenes to prevent the same.

The record shows that the Tice family, consisting of the father and mother, the two sons, A. J. and James W. Tice, and the daughter, the wife of S. P. Millett, occupied and lived upon and improved the land, and various transfers were made between themselves prior to July 23, 1866, as before recited. By deed dated May 13, 1863, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith, who, on February 25, 1869, conveyed to John R. Spring, who, on March 24, 1869, conveyed to Martin Clark, and Clark on May 15, 1876, conveyed to Naphtaly. By deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark. All of these conveyances were for a valuable consideration.

The applicant, Naphtaly, has filed an affidavit in which he states that he was well acquainted with the Tice family, that when the conveyance was made, owing to the insolvency of the father, it was made to the son, James W. Tice, and the legal title was in him, although the other members of the family were interested in the purchase. James W. Tice, it was claimed, mortgaged the land for his own benefit, the other parties interested therefore insisted that the title should be transferred to the mother by a deed of gift, Mrs. Tice, however, holding the title only in trust for the other parties in interest and especially as security for the interest she and her husband had in the ranch. Subsequently, when it was determined to sell the ranch, she agreed to convey, provided the claims against the same were paid, and her claim of $2,000 was satisfied, which claim of $2,000, with interest, Naphtaly subsequently paid.

If the conveyance to Urhetta Tice was simply a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property, a different rule might govern, and it may appear that the equitable title remained in the son, who was a qualified purchaser under the statute.

Whatever evidence there is on this point is outside the record, and is neither conclusive nor satisfactory, and in order that the facts may be ascertained, you are hereby instructed to order a further hearing on this point only.

Give due notice to the parties in interest and when the evidence is received, transmit the same to this Department for consideration, and in the meantime allow no disposal of the land in question.

PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866—RAILROAD GRANT.

NAPHTALY *v.* BREGARD ET AL.

The right of purchase under section 7, act of July 23, 1866, is not defeated by the fact that the legal title to the land in question, at the date of said act, is held by one not a purchaser for a valuable consideration, where the owner of the equitable title at such time is not thus disqualified.

The right of purchase under said section existing at the date when the grant to the railroad company became effective excepts the land covered thereby from the operation of said grant.

Secretary Noble to the Commissioner of the General Land Office, May 18, 1892.

In the decision rendered by this Department in the case of Naphtaly *v.* Bregard *et al.* (12 L. D. 667), it was stated that James W. Tice was a purchaser of the land involved for a valuable consideration, and that he, on April 5, 1861, conveyed the title to his mother Urhetta Tice, the consideration being love and affection, and her better support, maintenance, and protection. It was further held that Urhetta Tice, not being a purchaser for a valuable consideration, was not a qualified purchaser under the seventh section of the act of July 23, 1866, and consequently that Naphtaly, who derived title through her, was not qualified to thus purchase.

It was, however, said that,

"If the conveyance to Urhetta Tice was simply a deed "of trust for the benefit of the other members of the "family, and in the nature of a mortgage as security for

" a claim against the estate, a different rule might govern, " and it may appear that the equitable title remained in " the son, who was a qualified purchaser under the stat- " ute."

It was further stated that by deed dated May 13, 1868, Urhetta Tice, A. J. Tice, S. P. Millett and wife, conveyed the land to D. P. Smith, and that by deed dated April 1, 1869, James W. Tice conveyed the land to Martin Clark.

It thus appeared that seven years subsequent to the date of an instrument which purported to convey an estate in fee to Urhetta Tice, she, together with all the heirs except J. W. Tice, her grantor, conveyed by deed, and that eight years after said purported conveyance in fee to Urhetta Tice, her grantor conveyed the same premises by deed absolute to another party. These facts could not fail to excite comment, and to raise a doubt as to whether the estate held by Urhetta Tice was an estate in fee, or a conditional estate. It was largely in view of these facts, supported by the statement of Naphtaly, that " Mrs. Tice was holding the title only in trust for the other " parties in interest and especially as security for the in- " terest she and her husband had in the ranch," that it was deemed necessary that a further hearing be ordered, in order to ascertain, if possible, the real facts in the case, that justice to all parties might be done.

This recital is made for the purpose of showing that the contention of counsel for Bregard *et al.* that " the hear- " ing was granted on the uncorroborated affidavit of the " claimant himself, an affidavit not even based on his own " knowledge, but on mere hearsay, of the most indefinite " and uncertain character," is in no way sustained by the record.

At the rehearing all parties were fully represented by counsel and evidence, both record and parol, was intro-

duced. That evidence is now before me for consideration.

The first question to be determined is this: Was the deed given by James W. Tice, dated April 5, 1861, to his mother Urhetta Tice, and acknowledged October 21, 1863, an absolute conveyance in fee, or was it in the nature of a deed of trust for the benefit of the other members of the family, and in the nature of a mortgage as security for a claim against the property?

On its face the deed was an absolute conveyance of the premises in controversy.

In the case of Russell *v.* Southard (12 Howard, 139), the court, in inquiry as to whether a conveyance was a sale or mortgage, took into consideration the condition and relation of parties, the amount of consideration, etc., and held that, "Parol proof is admissible to show a deed "absolute on its face to have been intended as a mort-"gage."

In the case of Hughes *v.* Edwards (9 Wheaton, 489), the court say:

"A court of equity looks at the real object and inten-"tion of the conveyances; and when the grantor applies "to redeem, upon an allegation that the deed was intended "as a security for a debt, that court treats it precisely as "it would an ordinary mortgage, provided the truth of the "allegation is made out by the evidence."

In the case of Henly *v.* Hotaling (41 Cal. 22), the court say:

"When the intention of the parties to a deed, absolute "in form, is sought to be ascertained, not in the usual "way, by reading and construing the instrument, in con-"nection with evidence to identify the subject matter, the "parties, etc., but by evidence to establish an equity be-

" yond and outside of the deed, and thus to convert the " deed into a mortgage, the evidence ought to be so clear " as to leave no doubt that the real intention of the par- " ties was to execute a mortgage, otherwise the intention " appearing on the face of the deed ought to prevail."

With these rules for our guidance, the evidence submitted must be examined with a view to ascertain, if possible, the real object and intentions of the conveyance by J. W. Tice to Urhetta Tice, dated April 5, 1861.

The records show that on December 26, 1862, nearly two years subsequent to the deed of gift, J. W. Tice executed a mortgage of the premises in question to secure the payment of a note for $1,500, given by him and his father, James M. Tice.

On December 20, 1861, several months subsequent to the deed of gift, J. W. Tice by James M. Tice, his attorney in fact, entered into a contract with J. B. Crockett, an attorney at law, by which he agreed to convey to said Crockett, with covenants only against the acts of said grantor, for services rendered by said Crockett, an undivided one-eighth interest in the premises in controversy, with the exception of certain specified tracts.

James M. Tice, the attorney in fact, was the husband of Urhetta Tice.

The only explanation that can be given of his action is, that he considered the equitable title, at least, to be in J. W. Tice, and did not recognize the deed of gift as divesting him (J. W. Tice) of the title to the land.

It will be observed that these instruments were executed prior to the date of acknowledgment of the deed of gift, and of recording the same, and in my opinion they clearly indicate what was in the mind of the grantor; they indicate that he regarded himself as the owner of said premises, that the title was in him.

The conveyance, dated April 5, 1861, was not recorded until April 1, 1867. On said deed is the endorsement that it is recorded at the request of Urhetta Tice. At the trial of this case D. P. Smith testified that the grantor J. W. Tice had the deed recorded. However this may be, under date of April 25, 1867, J. W. Tice gave to Lloyd Tevis a mortgage of the premises in question as security for the payment of $4400 borrowed money; and on April 1, 1869, said J. W. Tice gave to Martin Clark a deed absolute for the premises in controversy.

The conveyance would certainly indicate that J. W. Tice considered that he had title to the land, which had not been divested by the deed of April 5, 1861, to his mother.

In what light did the grantee, Urhetta Tice consider this transfer?

On April 30, 1868, she entered into a contract with D. P. Smith to convey to him all the lands described in the above-mentioned deed of April 5, 1861. In this contract she agrees,

"that she will procure and deliver to said party of the "second part a deed to him from Andrew J. Tice, James "W. Tice, S. P. Millett, and Pauline V. Millett his wife, "of all their right, title and interest of every kind legal "and equitable, of, in and to all the land or lands here-"inbefore described."

The consideration for this contract was $2000 to be paid to Urhetta Tice, and in addition to said sum, Smith agreed to pay the $4400 borrowed by J. W. Tice, from Lloyd Tevis, to secure the payment of which said Tice had executed a mortgage of the premises in question to Tevis, on April 25, 1867. On May 13, 1868, Urhetta Tice, Andrew J. Tice, S. P. Millett and Pauline V. Millett, executed a

deed conveying the premises to D. P. Smith, consideration $7000. In the body of the deed the name of James W. Tice appears as one of the grantors, but he did not sign the deed.

It is not reasonable to suppose that had Urhetta Tice believed that the fee to the land in question was in her by virtue of the deed of April 5, 1861, and that she had the right to convey the same, that she would have agreed to procure deeds from other members of the family, neither is it reasonable to suppose that the various grantees would have united in a conveyance had they not considered that they had some rights to convey. The consideration, $7000 in round numbers, was the $4400 borrowed by J. W. Tice, and which Smith agreed to pay, and the $2000 which appears to have been the interest of Mrs. Tice, the mother, in the property.

Thus the evidence would indicate that neither the grantor nor the grantee, nor the other members of the family, considered the deed of gift, a deed absolute.

Is there anything in the record to indicate in what light the deed in question *should* be regarded?

The Tice family, consisting of father, mother, two sons, a daughter and son-in-law, occupied the property in common; it was their home and the ranch was carried on by them.

There is nothing to indicate that it was the intention of the various members of the family to surrender to the mother, or to transfer to her, all their property interest in this home, and which appears to have been the common property of them all.

The only member of the family who testified at the rehearing, was the daughter, formerly the wife of S. P. Millett, and who, with her husband, was an occupant of the ranch, before and at the time, and subsequent to the

conveyance dated April 5, 1861. She testified that the deed "was made to mother to secure us all."

"Q. What do you mean by 'secure us all'?
"A. Because we were all interested in it, my brother "was getting reckless and we wanted the property out of "his hands."

She further testified that her father could not take the deed in his own name on account of his indebtedness.

She was asked "whether the two thousand dollars to be "paid to your mother, Urhetta Tice, upon making the "deed by her and other members of the family, was paid "to her?"

The deed in question was the one dated May 13, 1868, before mentioned. She testified that $1500 was paid her at the ranch, and the balance in the city of San Francisco.

She also testified that after the death of her husband she (the witness) received the portion due her, as her interest in the ranch, also that J. W. Tice received the amount due for his interest in the property, and by reference to the deed of May 13, 1868, it will be seen that there was expressly reserved from the property transferred, the one hundred and sixty acres occupied by A. J. Tice, the other son; this was presumably a portion, at least, of his interst in the estate.

This evidence is clear and explicit and in connection with the other, throws much light upon the financial transactions of the Tice family, and the relations they held to one another financially. It shows that the deed of gift was not only for the protection of the mother of her interest, but was for the protection of the other members of the family.

Lloyd Tevis, who had taken the mortgage from J. W.

Tice to secure the payment of the $4400 borrowed, testified that when he discovered that the deed of gift had been placed on record just prior to the execution of the mortgage held by him, he had an interview with Mrs. Tice and made inquiry concerning said deed, and Mrs. Tice told him that "the deed was only intended to secure her for "the payment of two thousand dollars."

The contract dated April 30, 1868, and the deed dated May 13, 1868, is certainly strong corroborative evidence of the truth of this statement.

Moses G. Cobb, a lawyer who was employed to bring the foreclosure suit in 1868 on the mortgage given by Tice to Tevis in 1867, testified that J. W. Tice the grantor and Urhetta Tice the grantee in the deed of gift, both told him that the deed was given simply by way of security, and that for a limited amount, he thinks about $2000.

James W. Tice, the grantor in the deed of April 5, 1861, and the one, who above all others, could have given evidence as to the true intent of said conveyance, is dead. The grantee, Urhetta Tice, though living, refused to appear at the trial, or to give her evidence by deposition, although both parties swear that they endeavored to have her appear and testify.

The evidence shows that on June 28, 1891, five days subsequent to the departmental decision ordering a further hearing in the case, three men, acting in the interest of Naphtaly, had an interview with Mrs. Tice at her home near San Francisco, and in conversation with her in relation to the character of the deed dated April 5, 1861, she made and subscribed to the following statement:

"That at the time of my receiving from my son James "William, a deed to the Tice ranch, that there was due "and owing to me the sum of $2500, and the reason of

" the giving to me said deed was to secure me from any " loss as to said $2500."

It is shown that this statement in substance was made in the absence of undue influence. After the evidence in relation to this statement was submitted at the hearing, Urhetta Tice, after an interview with Josiah S. Smith, one of the contestants, made the following affidavit:

" I, Urhetta Tice, being duly sworn, depose and say, " that I am the same Urhetta Tice named in a certain " deed made by my son, James W. Tice, on the 5th day " of April, 1861, for love and affection and better main- " tenance and support; that said deed was not made to " secure the payment of $2500, or any other sum of money " due me from my son James, nor was my said son in- " debted to me when said deed was made, but said deed " was made for my sole use and benefit, and the same was " intended to be and was an absolute conveyance to me " of the property, and was made for the express purpose " of securing me a home, and not otherwise."

This was purely an *ex parte* affidavit taken without notice to the opposite party and with no opportunity for cross-examination. Objection was made to its introduction, and it cannot be taken as evidence; but even if it could be received, it simply demonstrates that the party will, either with or without a full understanding of the import of her words, make statements directly at variance with each other on the same subject, under different circumstance, and her evidence is of little or no value, on either side.

The only parties who appeared as witnesses for the contestants, were D. P. Smith and Josiah S. Smith both claimants adverse to Naphtaly.

An attempt is made to throw discredit upon the testimony of Mrs. Remington, formerly Mrs. Millett, the daugh-

ter, by asserting that she had made statements different from those made under oath. Thus, on December 15, 1891, Josiah S. Smith testified that on the day before he had an interview with Mrs. Remington who said to him, referring to the deed of April 5, 1861, that said "deed was given from her brother to her mother for a home for her mother and the children." On the same day D. P. Smith testified that on the day before he had an interview with the witness, who said referring to the deed of April 5, 1861, that "it was deeded to the old lady to keep the "boys from spending the money during her life time." I think it is evident from these varying statements, that these witnesses give their interpretation of what Mrs. Remington said, rather than what she actually did say, and their testimony did not impeach her clear and positive evidence.

D. P. Smith testifies that he was the agent who attended to the business of Mr. Tevis in his transaction with the Tices when the $4,400 was borrowed, that he was interested in having the agreement of April 30, 1868, perfected, that he visited Mrs. Tice in company with Tevis and he states that in that interview nothing was said about the deed of April 5, 1861, "being intended to secure a loan "of $2,000 from James W. Tice to his mother," further on he states that at that interview nothing was said about said deed being intended simply as a security for a loan of $2,000, or any other amount. When this evidence is analyzed in connection with the other evidence in the case, it will be found that it does not amount to a contradiction of the evidence submitted by Naphtaly. No where in the record is there any evidence that the deed of April 5, 1861, was made as a security for a loan, no where is there any attempt made to show that the mother had loaned money to the son, and had taken this deed as security.

The evidence of John A. White throws much light upon this transaction.

The deed from Pujol and Sanjurjo to James W. Tice was made February 14, 1855. Mr. White testifies that in the spring of 1855 he was a partner of James M. Tice (the father) under the firm of Tice and White, that the firm purchased the interest in the Romero ranch. His testimony is as follows:

"When we purchased that place, it was purchased for "James Tice and myself. The consideration was from "$3,000 to $3,500. We gave our note for that amount, "and took possession of the place. But the deed was "first made to J. M. Tice and White, then his family came "out here; then J. W. Tice came out here about that "time. Then J. M. Tice and myself had some business "trouble, and I said to him: 'I prefer to give it to your "'son J. W. Tice, and give me my note.' We took our "note up and let Sanjurjo take James W's note. I told "him it was better for them to take up our note, and take "J. W. T's and have our note made to him. My name "was crossed out of the old deed and it was transferred "to James W. Tice, and it was afterwards paid. That "was the way it was done, and James W. Tice took pos-"session of the ranch. It was paid out of some property "that originally belonged to Mr. James M. and myself. "I told him he could have the ranch. After getting back "the note I told him he could have the ranch, and I would "have nothing to do with it."

Thus the original payment is accounted for; it was made with the property of the father, James M. Tice. This was in 1855, and from that time until April 5, 1861, not only had the father labored to increase the value of the property, but the two sons, the son-in-law and the daughter had united their efforts to promote the same end. Owing to the action of the member of the family in whom the

title was vested, the other members including the father, who had paid the original purchase money, but who could not, on account of financial trouble hold the title in his name, desired security for their interests, and this was given by means of the deed in question absolute on its face, for a good, but not for a valuable consideration.

This deed was given for the security of an interest in the estate, or in other words, a debt against the estate, and this interest in the estate had been obtained, and the debt against the estate incurred, by means of the payment of money and by means of labor extended.

In the case of New Orleans Banking Association *v.* Adams (109 U. S., 211), the court say:

"While it may be conceded that no precise form of "words is necessary to constitute a mortgage, yet there "must be a present purpose of the mortgagor to pledge "his land for the payment of a sum of money, or the per- "formance of some other act, or it can not be construed "to be a mortgage."

Applying this rule to the facts in the case at bar, there can be no doubt that it was the intention of James W. Tice, by the deed of gift to pledge the estate to secure the interests of all parties entitled to protection.

In the case of Peugh *v.* Davis (96 U. S., 332), the court say:

"It is an established doctrine that a court of equity will "treat a deed, absolute in form, as a mortgage, when it "is executed as security for a loan of money. That court "looks beyond the terms of the instrument to the real "transaction, and when that is shown to be one of se- "curity and not of sale, it will give effect to the actual "contract of the parties. As the equity, upon which the "court acts in such cases, arises from the real character "of the transaction, any evidence, written or oral, tend-

" ing to show this is admissible. The rule which excludes " parol testimony to contradict or vary a written instru- " ment has reference to the language used by the parties. " That can not be qualified or varied from its natural im- " port, but must speak for itself. The rule does not " forbid an inquiry into the object of the parties in exe- " cuting and receiving the instrument. Thus, it may be " shown that a deed was made to defraud creditors, or to " give a preference, or to secure a loan, or for any other " object not apparent on its face. The object of parties " in such cases will be considered by a court of equity; " it constitutes a ground for the exercise of its jurisdic- " tion, which will always be asserted to prevent fraud or " oppression, and to promote justice."

The object of the deed dated April 5, 1861, between J. W. Tice and Urhetta Tice being shown, it is the duty of the Department to give it such an interpretation as will carry out the intention of the parties, and promote justice.

If the question of the right of the grantees of both Urhetta Tice and J. W. Tice, was entirely eliminated, and the question was resolved to that of the rights of Urhetta Tice and the other members of the family in reality the joint owners of the estate under the deed in question, there can be no doubt but that a court of equity would decree the instrument to be a mortgage for the security for the payment of each interest, and not a deed absolute, which would deprive the various ones interested of their rights, as to thus hold would be to work oppression and injustice.

In view of all the evidence in the case, and in view of the rule of law pointing out the construction to be given to conveyances, I am of the opinion, that the deed of April 5, 1861, must be held to have been a conveyance, in the nature of a mortgage, given for the security of claims against the estate, and that on July 23, 1866, the equitable title to the land in controversy, was in James

W. Tice and was by him on April 1, 1869, conveyed to Clark, and that Naphtaly is a qualified purchaser under the 7th section of the act of July 23, 1866.

In the decision of this case, by the local officers, certain tracts applied for by Naphtaly were awarded to the Western Pacific Railroad Company. In the decision by your office the question of the right of the company was left to future adjudication, and in the Departmental decision of February 4, 1889 (L. D., 144), no disposition of the claim was made.

The company claims under the third section of the act of July 1, 1862 (12 Stat., 489), which granted to it the alternate sections, designated by odd numbers, within ten miles of each side of the road, "not sold, reserved or "otherwise disposed of by the United States, and to "which a pre-emption or homestead claim may not have "attached at the time the line of said road is definitely "fixed." The road was definitely located opposite the land in controversy subsequent to the date of the passage of the act of July 23, 1866, under which Naphtaly claims, thus at the time the grant took effect by the definite location of the road, the land was occupied and in the possession of one entitled to purchase under the act of July 23, 1886, and this legal right, which was founded upon an equity which existed long prior to the date of the granting act, reserved the land from the operation of said grant.

This principle is in accordance with the ruling of the Department in the case of the Northern Pacific Railroad Company *v.* Killian (11 L. D., 596), and cases cited therein.

Departmental decision of February 4, 1889, is herewith recalled, and you will dispose of the case in accordance with the views expressed in my decision of June 23, 1891, and in this decision.

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSIAH SMITH,
APPELLANT,
v.
JOSEPH NAPHTALY.

No. 181.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLEE.

STATEMENT.

The amended complaint of appellant avers that he is the equitable owner and entitled to the exclusive possession of 160 acres in controversy, viz., N.E. ¼ Sec. 10, Tp. 1 S., R. 2 W., M. D. M., California.

That his right, title and interest arises because, being a qualified party, he settled in person in 1875 upon said land, then unsurveyed, built a dwelling in which his family have since resided, planted an orchard, cultivated the ground

and enclosed the land, his improvements being of the value of two thousand dollars; that about August, 1878, the land being then surveyed, he made his pre-emption filing in the proper U. S. Land Office; that at all times since he has been ready, anxious, and willing, and has at divers times at said land office offered and demanded, to make proof of his right to purchase said land, but has at all times been hindered and prevented by the adverse and groundless claim of defendant, as follows:

That defendant, on August 10, 1883, filed at the San Francisco Land Office his application to purchase said tract by virtue of the preference right conferred by Section 7 of the Act of Congress approved July 23, 1866, 14th Stat., p. 220, which right of purchase was based upon the assumption that, in 1844, Innocencio, José, and Mariano Romero obtained from the Mexican Government a grant of land; that about three thousand acres thereof, including the land in controversy, was subsequently partitioned to said Innocencio, and that about May 15, 1876, the defendant Naphtaly became, by mesne conveyances, a purchaser of said three-thousand-acre tract; that Secretary of the Interior Vilas rendered a decision rejecting his application to purchase, but that upon review Secretary Noble allowed the application, and Naphtaly was thereupon permitted to make payment and to receive patents for the lands in question; but that inasmuch as the Supreme Court of the United States had "found, held, and decided that no grant or "semblance of a grant had ever been made to the Romeros, "or any of them, for said land, or any part thereof, and on "that ground alone the said claim was rejected" (Rec., p. 3), and inasmuch as Secretary Noble had no authority to review the decision of his predecessor (p. 4), and inasmuch as Naphtaly purchased after rejection of title by United States Supreme Court, and with knowledge thereof (p. 4), *therefore*

the patents to Naphtaly were issued without authority of law and are wholly void.

The prayer of the bill was for a decree adjudging the sale to Naphtaly to be without authority of law and void; that the patent issued to him is of no legal force or effect; that Naphtaly has no estate, right, or title in the land adverse to the plaintaiff, and that he be forever enjoined and restrained from setting up or asserting any right or claim thereto adverse to the plaintiff.

The United States Circuit Court sustained demurrer and dismissed the bill. This decree was affirmed upon appeal by the United States Circuit Court of Appeals for the Ninth Circuit, from which affirmance the case comes here.

ARGUMENT.

I.

No fraud or imposition being alleged, appellant is upon the face of his bill a naked trespasser and has no standing in Court. He sets up the application of Naphtaly to purchase the lands in controversy and pursuant to the 7th section of the Act of July 23, 1866, which section required proof that applicant had purchased said lands in good faith and for a valuable consideration from a Mexican grantee or his assigns; that the alleged grant had been subsequently rejected, and that the applicant had used, improved, and continued in the actual possession of the same, according to the lines of his original purchase. Proof of the use, improvement, and continuous actual possession of the lands applied for lay at the very foundation of Naphtaly's petition to the Land Department, and it appears upon the face of appellant's bill that a full hearing and investigation of all matters alleged in the petition, including

the claim as to use, improvement, and possession, was had before the proper officers of the Land Department. It follows from the allowance of Naphtaly's application and the issue of patent to him that the decision of the officers of the Land Department was in his favor upon those questions of use, improvement, and continuous possession by himself and his grantees; and that the claim thus allowed related back to the date of the Act of July 23, 1866, unaffected by subsequent unlawful disturbance. (*Watrous* v. *Reed*, 99 *Cal.* 134.)

Inasmuch as there is no allegation of fraud, imposition, false testimony, or other unlawful means used by Naphtaly to procure the decision of the Land Department in his favor, and as his right of purchase takes effect by relation as of the date of the Act of July 23, 1866, it necessarily follows that the appellant is a naked trespasser, and that his intrusion upon the land in 1875 was unlawful and totally void. Upon the face of his bill he is clearly within the repeated ruling of this Court that, as against existing occupants, a settlement upon public lands already occupied is a naked, unlawful trespass and cannot initiate a right of pre-emption.

Atherton v. *Fowler*, 96 *U. S.* 513;
Hosmer v. *Wallace*, 97 *U. S.* 580; and
Quinby v. *Conlan*, 104 *U. S.* 423.

II.

In affirming the application of Naphtaly under Section 7, Act July 23, 1866, the land being public land and subject to sale, the Land Department acted wholly within its jurisdiction, and, upon the pleadings in this case, its findings are not reviewable by the courts. The Secretary of the Interior was authorized by the statute to determine

whether upon the proofs the necessary facts were satisfactorily established to bring the application of Naphtaly within the requirements of the law. Under whatever form of words appellant seeks to disguise his purpose, the averments of his bill clearly present only an attempted traverse of the conclusions of the Land Department upon the testimony before it. Under the 7th section, Act July 23, 1866, the Land Department was authorized to recognize a preference right of purchase by parties, who established to *its* satisfaction the following facts, viz:

1st. That the applicant purchased the lands from a Mexican grantee or his assigns.

2d. That he purchased the lands in good faith and for a valuable consideration.

3d. That the grant had "subsequently been rejected" or the lands purchased had been "excluded from the final "survey."

4th. That the purchasers had "used, improved, and con- "tinued in the actual possession of the same according to "the lines of their original purchase."

5th. That no valid adverse right or title (except of the United States) existed thereto.

6th. That the lands did not contain mines of gold, silver, cinnabar, or copper.

These were all matters of proof. They were facts to be established to the satisfaction of the Land Department. "Upon first making proof of the facts as required in this "section under regulations to be provided by the Commis- "sioner of the General Land Office" is the language of the statute under consideration. When, then, the proper officers of the Land Department have determined these matters of fact and patent has issued pursuant to such decision, the courts will not interfere with that title upon an averment that the officers were mistaken in their view of

the facts, or erred in their judgment upon the weight of evidence before them. The sufficiency of the facts was within the exclusive jurisdiction of the Land Department, and its determination thereof is conclusive.

As was said by the Court in *Lee v. Johnson*, 116 U. S. p. 49:

"The Court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which these officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department."

Johnson v. *Towsley*, 13 Wall. 72.
Shepley v. *Cowan*, 91 U. S. 330, 340.
Moore v. *Robbins*, 96 U. S. 530, 535.
Marquez v. *Frisbie*, 101 U. S. 473, 474.
Quinby v. *Conlan*, 104 U. S. 420, 426.
Smelting Co. v. *Kemp*, 104 U. S. 636, 640.
Steel v. *Refining Co.*, 106 U. S. 447, 450.
Baldwin v. *Starch*, 107 U. S. 463, 465.
Bardon v. *Railroad Co.*, 154 U. S. 288.
Vance v. *Burbank*, 101 U. S. 514.
Hoofnagle v. *Anderson*, 7 Wheat. 212.
Ehrhard v. *Hogaboom*, 115 U. S. 67.
New Dunderberg Mfg. Co. v. *Old*, 79 Fed. Rep. 598, 603.

III.

If, however, the Court believes that upon the face of his bill appellant avers such equities as would control the legal title in the patentee's hands, it then becomes necessary to inquire whether the officers of the Land Department in issuing patent to Naphtaly mistook the law applicable to the record facts, or misunderstood the statute, so

that the title, which ought to have gone to Smith, has been erroneously issued to Naphtaly.

Appellant advances four propositions to establish such misconstruction of law:

1st. That one Secretary of the Interior has no power to grant a rehearing of a case decided by his predecessor; and thereupon, as the claim of Naphtaly was denied by Secretary Vilas, the subsequent reconsideration and allowance thereof by Secretary Noble was without authority of law, and void.

2nd. That as the preference right to purchase provided for in Section 7, Act of July 23, 1866, was extended to purchasers, &c., from "Mexican *grantees*, or assigns, which "*grants* have subsequently been rejected," and as the Romero claim was rejected because there was no *grant*, therefore the Land Department was without authority to permit a purchase of *that* land under the Act of 1866.

3rd. That even if a right of purchase ever existed in any one, Naphtaly was not a purchaser in good faith, he having bought after final rejection of the Romero claim of title.

4th. That the Naphtaly patent is void, because whilst his right of entry accrued under the Act of July 23, 1866, the patent erroneously recites its issuance under the Act of April 24, 1820.

A.

Power of the Secretary to Reconsider.

The Secretary of the Interior is authorized to prescribe Rules of Practice for the conduct of business in the Land Department, and the legal effect of such regulations has been uniformly recognized. The rule governing motions for review of decisions of the Secretary of the Interior, which was in force at date of the decision of Secretary

Vilas of February 4, 1899, and which was approved by Secretary Vilas himself, under date of June 14, 1888, was as follows (see printed Rules of Practice, approved August 13, 1885):

"Rule 114. Motions for review before the Secretary of "the Interior, and applications under Rules 83 and 84, "shall be filed with the Commissioner of the Land Office, "who will thereupon suspend action under the decision "sought to be reviewed and forward to the Secretary said "motion or application."

The record does not challenge the regularity of the motion for review in pending case, and same may therefore be assumed. To show, however, the exact sequence of dates, we print for convenient reference, in appendix to our brief in 180, copy of the motion for review, of the letter filing same, and of the proof of service. Mr. Vilas went out of office March 4, 1889. His decision in the Naphtaly case was dated February 4, 1889 (Rec., p. 10), and the motion for review was filed on March 1, 1889. The review was thus prayed for during the incumbency of the *same* Secretary who rendered the decision.

No question has been made as to the power of a Secretary to review his own decision. The contention of plaintiff in error has been that a succeeding Secretary could not review the decision of his predecessor. Inasmuch, then, as jurisdiction to review attached during the official term of Secretary Vilas, it must have continued after his retirement until decision of his successor unless the jurisdiction to review was purely personal to the temporary incumbent of the office. We need scarcely answer that contention.

The rule is, however, well established that where title has passed out of the United States, so that the jurisdiction of the Executive Department has ended, there is no authority

to review. That is the doctrine of *Noble* v. *Logging Co.*, 147 U. S., and of *U. S.* v. *Stone*, 2 Wall. 537, relied upon by plaintiffs in error. In such cases no succeeding Secretary could lawfully review the executed decision of his predecessor. Neither could the same Secretary have done so under like conditions. But no such rule prevails where the matter is still within the jurisdiction of the Department. A decision being unexecuted, the matter is *in fieri* and is subject to such further action as the officer who is called upon to act may determine to be proper and lawful. The power of review where the *rem* is still within the jurisdiction of the Secretary has been uniformly exercised in the Land Department, and the principle underlying such exercise of revisionary authority was clearly stated by this Court in *Williams* v. *U. S.*, 138, U. S. 524.

"It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and therefore that the Secretary of the Interior is given that superintending and supervisory power which will enable him, in the face of these unexpected contingencies, to do justice."

So also in *Knight* v. *Land Association*, 142 U. S. 178:

"For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be

" consummated which it would be immediately his duty to
" ask the Attorney-General to take measures to annul."

And the point raised by plaintiffs in error was distinctly ruled upon in *New Orleans* v. *Paine*, 147 U. S. 266 :

" Until the matter is closed by final action, the proceed-
" ings of an officer of the Department are as much open to
" review or reversal by himself, *or his successor*, as are the
" interlocutory decrees of a Court open to review upon the
" final hearing."

And the Court at present term—in *Michigan Land & Lumber Co.* v. *Rust*, *No.* 57—has settled the question beyond the need for further discussion by distinctly holding executive jurisdiction continuing until legal title has vested when the Courts thereafter take jurisdiction.

B.

Want of authority to sell lands to purchasers, etc., where grant was rejected upon the ground that no grant was ever issued by Mexico.

The contention of plaintiff in error is that the preference right of purchase extended by Section 7, Act of July 23, 1866, has no application where no grant had been made by Mexico. The argument in brief is that, there having been no grant, there could be no rejection of a grant, and hence there could be no Mexican grantee from whom to purchase.

This contention is narrow, technical, and unsound. It is a mere play upon words, which defeats the remedial purpose of the statute. Congress had in 1851 provided for the adjudication of these grant claims; and pending their final settlement had reserved all lands within their claimed

limits from the operation of the public land system. (See *Newhall* v. *Sanger*, 92 U. S. 761). Many years were occupied in this inquiry, during which the extent, whether of title or location, to which these claims would be finally located, was purely a matter of legal opinion. In the meantime, California was being rapidly settled. The most valuable agricultural lands were naturally included within these Mexican grant claims, and were the object of the most speedy sales and transfers. They could not be purchased under the public land laws, having been reserved therefrom, until final judicial rejection, and the apparent ownership of the grant claimants to all lands within their claimed limits was fully recognized and protected by the courts, both State and Federal (*Van Reynegan* v. *Bolton*, 95 U. S. 33). These lands, so claimed, were legally sold, and the tracts so purchased were extensively improved and resold over and over again. After all this had occurred during the lapse of many years, the examination under authority of Congress resulted in some cases in rejecting the entire claim, in other instances in confirming it in part, and in others in confirming it as an entirety. In the case of a wholly rejected grant, all these Mexican grant claimants and their assigns were left absolutely without title. In partially confirmed grants, the segregation, like a blanket, could only cover a given area, and when pulled over one set of derivative claimants it was necessarily pulled off another set. In confirmation as an entirety it often happened that the survey did not locate the boundaries as they had been theretofore claimed, and thus excluded occupants under the grant claim of title. In one way and another, many derivative claimants were thus left in actual possession, but without title. They had paid large sums for their lands and had put upon them valuable improvements. They were, too, the only persons whose right of

possession had been recognized and protected by the courts. The equities of these parties appealed strongly to Congress, and at first received recognition in a series of special acts, which finally led up to the general provisions of the 7th section of the Act July 23, 1866. No less than seven of such special laws were thus enacted prior to said general law (Soscol Ranche Act, March 3, 1863, 12 Stats., p. 808; Rancho Bolsa de Tomales, 13 Stat., p. 136; Rancho Laguna de los Santos Calle, 13 Stat., p. 372; Ex-Mission San Jose, 13 Stat., p. 534; City and County of San Francisco, 14 Stat., p. 4; Rancho los Prietos y Najalayegua, 14 Stat., p. 589; Towns of Benina and Santa Cruz, 14 Stat., p. 209), until Congress finally covered the cases of all like purchasers or their assigns in similar possession under the general preference right of purchase enacted in Section 7, Act of July 23, 1866. Congress did not therein undertake to validate defunct titles. No donation was made. Congress simply determined by this legislation that a citizen who had in good faith bought from these Mexican claimants and occupied the lands purchased, and whose possession under color of title had been recognized and protected, but whose claim of title had failed, should have a right to purchase those lands in preference to a party who had no recognized right of possession, and who had neither purchase money nor improvement at stake. The principle of the statute was not the ownership of a legal title, but rather the protection of an equity; and the required qualifications were a purchase from one claiming to have been a Mexican grantee, and possession under such claim of title according to the lines of purchase, but to which the claim of title had failed;—failed for either of the only two possible reasons, viz., that the title had been rejected, or that the lands had been surveyed out. The inquiry under the obvious purpose of the law is, Did the

claimant of the preference right of purchase from the United States buy these lands from a grantor whom they believed to have been a grantee of the Mexican Government, and if so, has he improved and had possession of the lands so purchased? The principle was clearly stated by the Supreme Coure of California in *Buscomb* v. *Davis*, 56 Cal. 152, wherein it was said:

"If we should hold that a 'Mexican grantee' means a "person to whom a grant has been made by the Mexican "Government, it is quite clear that Galindo would not be "within that description; but that construction of the act "would render it superfluous, and Mexican grantees or their "assigns would not require any such aid. The Act there- "fore must have been passed for the benefit of others than "those who had purchased lands of grantees of the Mexi- "can Government. We believe that it was passed for the "benefit of those who, in good faith and for a valuable "consideration, had purchased the lands, which were *sup-* "*posed* to have been granted by the Mexican Government, "and who had used, improved, and continued in the actual "possession thereof as provided in the Act.

"It seems to us that the good faith of the purchaser, his "payment of a valuable consideration, and his occupation "and improvement of the land were the considerations "which moved Congress to pass this Act; and, if so, the "case of this defendant is fairly within the spirit of the "law. In the absence of any valid or adverse right or title, "or *bona-fide* pre-emption claim, there does not seem to be "anything inequitable in the United States preferring as a "purchaser one who has once paid for the land, under the "honest but erroneous impression that he was acquiring a "valid title, to the one who had never purchased or occu- "pied it. We are, therefore, of the opinion that the de- "fendant was a purchaser within the meaning of the Act of "Congress above referred to."

The principle of construction, for which we contend was squarely ruled upon by this honorable Court in *Winona*

and St. Peter R.R. Co. v. *Barney*, 113 U. S. 626. Congress had granted certain lands to the Territory of Minnesota for railroad purposes, and had further provided indemnity for specified losses in the lands "granted as aforesaid." Under the same technical construction of the word "granted" that is asserted here by plaintiffs in error, it was contended that the Government did not own lands sold by it before date of the grant, and as it could not grant what it did not own, indemnity was not due under the words "granted as aforesaid." But this Court, in deciding that the indemnity covered losses both before and after date of the grant, disposed of the above contention by saying:

"It is of no purpose to say against this construction that "the Government could not grant what it did not own, and "therefore could not have intended that its language should "apply to lands which it had disposed of. As already said, "the whole Act must be read to reach the intention of the "law-maker. It used, indeed, words of grant which pur-"port to convey what the grantor owns, and of course can-"not operate upon lands with which the grantor had parted; "and *therefore when it afterwards provides for indemnity* "*for lost portions of the lands 'granted as aforesaid' it* "*means of the lands purporting to be covered by those* "*terms.*"

By analogous reasoning Section 7, here in question, in saying "which grants have subsequently been rejected, or "where the lands so purchased have been excluded from "the final survey of any Mexican grant" should obviously be read as "which purported grants" or which "claims of "grants." This follows necessarily, because the evil intended to be remedied was a bona-fide purchase and continued possession culminating in a *total failure of title.*

C.

That Naphtaly was not a Purchaser in Good Faith, he Having Bought After Final Rejection of the Romero Title.

The Romeros, on January 18, 1844, solicited a grant from the Mexican Governor. Upon their petition was a marginal decree directing the Secretary to report upon the subject, "having first taken such steps as he may deem nec- "essary." There was also a certificate of the Secretary that the Governor directs the first Alcalde of San Jose to summon the colindantes and report upon their allegations; a report of the Alcalde that the colindantes, having been duly summoned, made no objection to the grant, but that another party had claimed the same tract several years before; a report from the Secretary that there was no obstacle to making the grant; a decree directing measurement of the land by the proper judge, and that he "certify the re- "sult so that it may be granted to the petitioners;" a second petition of the Romeros stating failure of judge to make measurement and asking provisional grant; report of Secretary that survey should first be effected, and decree of Governor, viz., "Let everything be done agreeably to the "foregoing report."

In *Romero* v. *United States*, 68 U. S. 740, the United States Supreme Court decided that these documents were not sufficient evidence to establish a grant or concession from Mexico, and finally rejected the claim. This was in December, 1863. But in January, 1844, the Romeros went into possession of the lands then petitioned for, and in 1846 or 1847 the tract here in controversy was partitioned to Innocencio Romero. Said Innocencio in turn sold and conveyed for value, on December 26, 1853, to Domingo Pujol

and Francisco Sanjurjo, and through subsequent mesne conveyances the same tract passed to S. P. Millett, August 5, 1859, who continued in the actual possession and cultivation thereof according to the lines of the original purchase at the time of the passage of the Act of July 23, 1866, and long subsequent thereto. Thereafter the title passed for value through various parties, and with continued use and possession, until it was finally vested in Naphtaly.

So that the title passed for value from the Romeros, the original Mexican claimants, ten years prior to final rejection of the title, and it similarly was vested in Millett four years prior to such rejection, and remained in him until long subsequent to the passage of the Act of July 23, 1866. The material fact, then, is that Millett purchased prior to the final rejection of the grant, and was at the date of the passage of the Act of July 23, 1866, a fully qualified beneficiary of the preference right of purchase under the seventh section thereof. The contention of plaintiff in error is therefore a mere denial of the assignability of that preferential right of purchase.

But the entire policy of the law in the matter is against restraints upon the alienation of interests in or titles to lands; and it has been uniformly held that every right, title, interest, or claim in lands is assignable or inheritable, unless such transfer or descent is prohibited by statute. *Co. Litt.* 46 *B.*; *Washburn on Real Property, Ch.* 1, *Sec.* 20; *Thredgill* v. *Pintard*, 12 *How.* 24; *Myers* v. *Croft*, 13 *Wall.* 291; *Lamb* v. *Davenport*, 13 *Wall.* 418; *Hussey* v. *Smith*, 99 U. S. 22. The most recent reaffirmance of this general right to assign interests in lands will be found in *Webster* v. *Luther*, 163 U. S. 311, wherein this Court affirmed the right to transfer before entry a right of additional homestead.

The language of the seventh section, Act of July 23,

1866, clearly does not prohibit the alienation of the preference right therein provided for; and neither would the purpose of the law. On the contrary, the statute in terms conferred the preference right only upon assigns. Nor did the law impose as a condition upon this right to purchase some act to be performed by a particular beneficiary of such character as to make the right a personal one. On the contrary, the condition of the law had already been performed, and the right to make entry had vested. It did not cease merely because, as in present case, the unsurveyed character of the land did not put it in condition for entry until the beneficiary had died or had alienated his interest. The continued possession and under purchase for value from the original Mexican grantee or his "assigns" were the equities to which the relief of the law was directed; and those equities, established and vested at date of the remedial Act, were quite as potent in the hands of one assign as in the ownership of another. The hardships of the case, which Congress had in view, were quite as great in either case; and whilst Naphtaly is chargeable at time of his purchase with notice of the prior rejection of the grant title, he is equally entitled to knowledge of the vesting of the preference purchase right and of its assignability. His right is clearly within the equity of the Act of Congress.

The rulings of the Land Department have been uniformly in support of the right of assignment (*Wilson* v. *C. & O. R.R. Co.*, 1 Copp's Land Owner, 471; *Owen* v. *Stevens*, 3 Land Decision, 401; *Welch* v. *Moline*, 7 *ib.* 210). Such continuous executive construction for thirty years past, and the innumerable rights vested thereunder, should constitute a very persuasive, if not wholly conclusive, argument.

IV.

Alleged Erroneous Citation of Statute in Naphtaly Patent.

Appellant strenuously contended below that the patent is void because, whilst Naphtaly's right of entry accrued under the Act of July 23, 1866, the patent erroneously recites its issuance under the Act of April 24, 1820, although the argument is not repeated here.

This objection is clearly without merit—

1st. Because it is a correct recital. The Act of April 24, 1820, the general provisions of which were carried into the Revised Statutes, fixed the minimum price of the public lands at $1.25 per acre; and all patents since issued for public lands paid for at that price have contained this same recital. The 7th section, Act of July 23, 1866, simply authorized the purchase therein provided for "at the mini-"mum price established by law," and the Act of April 20, 1820, fixed that minimum price. It was therefore a correct recital in the sale as the authority for the price paid.

2d. The patent contained the necessary and usual words of grant to carry title. Beyond question, it was sufficient to vest the legal title in Naphtaly. If there is any informality in the mere recitals upon its face, that is a matter which concerns only Naphtaly. It does not concern the appellant. Assuming such informality, Naphtaly could, if he deemed it important, seek relief and secure correction of such informalities, but it is not sufficient ground for appellant to set aside the patent of Naphtaly. The principle was clearly settled in *Kansas City, &c., R.R. Co.* v. *Attorney-General*, 118 U. S. 693, wherein the Court said:

"If there be any informality in the attempt of the Sec-
" retary of the Interior and of the State of Kansas to con-
" fer upon the Railroad Company the legal title to these
" lands, it is for the Company to seek relief and to have
" those informalities corrected, not for the United States to
" set aside its solemn instruments in which those rights are
" evidenced, and under which not only the Railroad Com-
" pany then interested, but its grantee, the present appel-
" lant, holds these lands or has sold them to innocent
" purchasers."

The assumption that appellant can maintain suit under Section 738 of the Code of Civil Procedure of California and the authorities cited in support thereof is not pertinent here. *If* the appellant had a case cognizable in equity by reason of superior equities, the law as declared by the Federal authorities *supra* would sustain that right independent of any State statute. As he does not possess such equities, and that conclusion is apparent upon the face of his bill, no State statute or code of procedure can aid him or have any bearing upon the question.

Conclusion.

Upon the one hand appears continuous use and possession by the original claimants since 1844, and their successive grantees in interest for a period of over fifty years. The protection of the equity of *that* possession was the clear design of the Act of 1866, which, as its title imports, was an Act "to quiet land titles in California." The Act has been so administered in numerous cases, and repeated judicial rulings have upheld such design and administration. Intruding upon that possession of many years come the defendants—admitted trespassers intruding with full knowledge of the existence and extent of the prior right and possession

far outrunning the common-law period of limitation. They have been again and again ejected under judicial process, returning *vi et armis* and in contempt of judicial process. What standing should they enjoy in any court of law or equity viewed from any legal or moral standpoint?

Under all the circumstances disclosed by the record the concurring decisions of the Circuit Court and Circuit Court of Appeals are manifestly right and should be here affirmed.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
Attorneys for Appellee.

IN THE

Supreme Court of the United States.

JULIUS A. BELEY ET AL.,
PLAINTIFFS IN ERROR,

v.

JOSEPH NAPHTHALY,
DEFENDANT IN ERROR.

No. 180.

PETITION FOR REHEARING.

Your petitioners, Julius A. Beley, F. Darling, and Charles Dragard, respectfully ask the Court to grant a rehearing in the above-entitled cause, and to set aside and reverse their decision rendered therein February 28, 1898; and, to that end, they respectfully show unto the Court—

1. That, as will more fully appear from the accompanying affidavit, prayed to be taken as a part hereof, and for the reasons therein set forth, certain facts, arguments, and authorities were not called to the attention of the Court, wherefore the Court did not consider or pass upon all of the material points involved in the above-entitled cause.

2. That jurisdiction was not "conferred on the circuit court by joining in one bill against distinct defendants claims no one of which reached the jurisdictional amount"

(Citizens' Bank *v.* Cannon, 164 U. S. 319, and cases cited); and that the amended complaint fails to allege that the value of the tracts, occupied respectively by your petitioners, *separately* exceed the sum of two thousand dollars, or that the matter in dispute as to *each* of your petitioners, exclusive of interest and costs, exceeds the sum of two thousand dollars.

3. That the act of July 23, 1866, which Congress expressly declared to be "An Act to quiet land Titles in California," and upon which, as shown by the amended complaint and recognized by the court, "the plaintiffs' action rests primarily," made it proper and necessary, as the title of the act purports, and because it is remedial in its nature, to bring the above-entitled action in equity by bill and not at law in ejectment, as the pleadings show it was brought and as it is acknowledged even in the brief for defendant in error to have been brought; and that, not having been brought in equity but at law, the circuit court was without jurisdiction in the matter.

NOTE.—In Doolan *v.* Carr, 125 U. S. 618, where the Court held, as shown by the syllabus, that—

"The proper circuit court of the United States has jurisdiction, irrespective of the citizenship of the parties, of an action of ejectment, in which the controversy turns upon the validity of a patent of land from the United States,"

the distinction between ejectment suits and suits in equity was not the question before the court, and, moreover, the statute, under which in that case the patent in question was issued, was not remedial, nor "to quiet titles," but "to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean"; wherefore the said decision therein does not form a precedent for the case at bar.

4. That the action being in ejectment and no question of the construction or legality of the act of July 23, 1866, or of the validity of the patents claimed to be issued thereunder being set up *affirmatively* in the amended complaint, said complaint did not present a Federal question, for—

"It must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character" (Metcalf *v.* Watertown, 128 U. S. 586);

that it is not *defences* which *may* be raised that make the suit Federal in its nature, even in equity; and that, moreover, the allegations in the amended complaint *as to what the defendants claim* are not proper *in ejectment*, and were *surplusage*, and the plaintiff cannot avail himself of them; and that the question of jurisdiction may be raised at any time and cannot be waived (Parker *v.* Ramsby, 141 U. S. 81; Mexican Nat. R.R. Co. *v.* Davidson, 157 U. S. 201); nor was it waived (R., p. 5), although neither the courts below nor this court passed upon the question.

5. That the only possible ground for the jurisdiction of the circuit court was the fact that the patent, upon which the ejectment suit was brought, was issued under the act of July 23, 1866, and that the action should have in equity by bill, wherein the complainant *should have alleged that he had complied with the requirements of the act;* and that, in such an action only, was it possible for your petitioners to set up in answer the *equitable* defences impliedly made such by the terms of that act itself.

6. That the patents upon which Naphthaly relied made no mention of the act of July 23, 1866, which act of Congress *only* makes it legal to issue patents in such amounts, and yet they were for $371\frac{40}{100}$ and $566\frac{16}{100}$ acres of land respectively; wherefore they were not valid even *upon*

their face, and wherefore, especially, the suit, in order to give jurisdiction to the circuit court, should have been begun by bill in equity with the above allegations.

7. That Millett *did not assign* to Smith his *right* under the act of July 23, 1866, *to purchase* of the Government the lands in question, nor did Smith to Spring, nor did Spring to Clark, nor did Clark to Naphthaly, the defendant in error; but that each respectively simply *conveyed his Mexican title to the lands*; that five years before Millett conveyed to Smith, the Romero Mexican grant had been declared void by this court; and that it was not Millett nor Smith nor Spring nor Clark, but *Naphthaly*, who (and not until in 1883) made application to the Government to purchase said lands in accordance with the conditions of the act of July 23, 1866.

8. That the act of July 23, 1866, says nothing about the *bona fides* of the "Mexican grantees or assigns," but speaks of the *bona fides* of that person only who purchases lands of "Mexican grantees or assigns," and who becomes the applicant to purchase said lands of the Government (and this person is Naphthaly); wherefore *it is Naphthaly who must be a purchaser of the Mexican grant "in good faith,"* for the act says:

"That where *persons in good faith*, and for a valuable consideration, have *purchased* lands of Mexican grantees or assigns, . . . *such purchasers* may purchase the same . . . at the minimum . . . ."

9. That *Naphthaly was not a bona fide purchaser* because the Mexican grant under which he claimed was purchased by him thirteen years after the final tribunal had declared it void, under which circumstances he could not, in law or in good faith, have supposed it to be valid; for—

"The question is not whether the defendant in fact saw any of the muniments of title [or the decision declaring the grant void], but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected." (Brush *v.* Ware, 15 Pet. 93.)

10. That *aside* from any question of *bona fides*, Naphthaly in his purchase did not conform to another requirement of the act of July 23, 1866, because the grant under which he claimed (admitting for the sake of argument that no actual grant was necessary, or even that he had an actual grant) was not rejected *subsequently* to *his* purchase (but thirteen years before), for that act says:

"Where persons . . . have *purchased* lands of Mexican grantees or assigns, which grants have *subsequently* been rejected . . . *such purchasers* may purchase. . . ."

11. That the court failed to notice, in citing as precedents Thredgill *v.* Pintard, 12 How. 24, and Webster *v.* Luther, 163 U. S. 331, that the subjects-matter there in issue were a pre-emption and a soldier's additional; that *the assignments* of the *right to apply* to the Government therefor were made *as such;* and that the applications there made to the Government were made by the *first*, and only assignee; wherefore, in no sense, are they precedents for the case at bar, and especially in view of the language, to which attention has already been called, of the act of July 23, 1866, which, of course, must be all-controlling in the case at bar.

12. That the court in their opinion recognize that the patents to Naphthaly would be void, and could be declared so, if *he*, the patentee, has not "used, improved, and con-

tinued in the actual possession of the same according to the lines of their original purchase," but their attention was not called to the fact that the form of the action, being at law in ejectment, precluded your petitioners from offering this and other equitable defences, the *possibility* of establishing which ought to be recognized even now in view of paragraph 2 of the accompanying affidavit, prayed to be taken as a part hereof.

13. That though your petitioners admitted they had no title from the Government, they, as will more fully appear from the accompanying affidavit, prayed to be taken as a part hereof, were, and have now been for about twenty years, in possession of the lands in controversy, have raised their families and made the only, and valuable and permanent, improvements thereon and desire to make application therefor of the Government; and that, moreover, under no circumstances, ought this admission to have weighed against them; for—

"The rule in ejectment is that the plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary." (Dick *v.* Foraker, 155 U. S. 414.)

Nor (although, in such a suit, no such admission would have been made, but your petitioners could have offered equitable defences) could such an admission have weighed against them, even had the action been brought, as it should have been, in equity; for—

"A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief. . . . As observed by Mr. Justice Grier in Orton *v.* Smith, 'Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a

court of equity to give them peace or dissipate a cloud on the title.' 18 How. 265." (Dick *v.* Foraker, *supra.*)

And your petitioners respectfully ask that they may be granted an oral hearing.

JULIUS A. BELEY, F. DARLING,
AND CHARLES DRAGARD,
By GEORGE C. HAZELTON,
Their Attorney.

PHILIP TEARE,
of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

JOSIAH H. SMITH, Appellant, *v.* JOSEPH NAPHTHALY, Appellee. } No. 181.

Petition for Rehearing.

Your petitioner, Josiah H. Smith, respectfully asks the court to grant a rehearing in the above-entitled cause and to set aside and reverse their decision rendered therein February 28, 1898; and, to that end, asks that the reasons, so far as applicable, set out in a similar petition filed this day in the case of Julius A. Beley *et al. v.* Joseph Naphthaly, No. 180, may be taken as a part hereof; and respectfully asks that he may be granted an oral hearing.

JOSIAH H. SMITH,
By GEORGE C. HAZELTON,
His Attorney.

PHILIP TEARE,
of Counsel.

I hereby certify that I have read over the foregoing petitions for rehearing in causes Nos. 180 and 181, by me subscribed, and know the contents thereof; and that the same are well founded in law, and are filed in good faith and not for the purposes of delay.

GEO. C. HAZELTON.

SUPREME COURT OF THE UNITED STATES.

JULIUS A. BELEY *et al.*
v.
JOSEPH NAPHTHALY. } No. 180.

JOSIAH S. SMITH
v.
JOSEPH NAPHTHALY. } No. 181.

Petition for Rehearing.

DISTRICT OF COLUMBIA,
City of Washington, } *ss:*

Philip Teare, being first duly sworn, deposes and says that he is an attorney at law residing in Oakland, California, and that he was formerly U. S. Attorney for the State of California; that he was the attorney of record for the above-named petitioners up to the time said cases came to this court, and that, since that time, he has been, and now is, the attorney for said parties; but that, not being at that time a member of the bar of this court, Henry F. Crane was engaged to argue said cases before this court; that the deponent furnished certain arguments

and authorities to the said Crane to be embodied by him in his brief to be filed in said causes in this court, but that, on account of his sickness, said Crane failed to embody the same therein, and, moreover, without the authority of said petitioners or deponent, submitted said cases to this court upon his brief filed therein; that your deponent did not know that said arguments and authorities were not included in said brief and did not see a copy thereof, nor did he know that said Crane could not appear in person and argue said cases to this court, until after the decision of this court was rendered therein.

2. That he has often visited the lands involved in this controversy and is well acquainted with them and with said petitioners; that each of said petitioners is in possession of a separate parcel of land amounting to about 160 acres; that they have resided thereon with their families for about twenty years (except the above-named Darling, who has resided thereon for a lesser period); that they have built houses, barns and fences, planted orchards and made other general farming improvements thereon, and that they desire to purchase, or otherwise acquire, said lands of the Government; that said improvements made by them are the only improvements, to the best of deponent's knowledge and belief, ever made upon said lands; that to the best of deponent's knowledge and belief, who has lived in California forty-five years, said Naphthaly never made any permanent improvements and never resided on any of the lands involved in this controversy; that no survey was made of these lands by any one until made by the United States, and that said Naphthaly did not survey the whole or any part of the land in controversy, nor apply to the Government to purchase the same, nor claim the whole, nor any definite parcel thereof, until after said Government survey had

been made and the plats thereof filed in the local offices in California. And further deponent sayeth not.

PHILIP TEARE.

Subscribed and sworn to before me this 31st day of May, 1898.

[SEAL.]

TENNEY ROSS,
Notary Public.

BELEY v. NAPHTALY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 180. Submitted January 5, 1898. — Decided February 28, 1898.

The patent to the defendant in error does not preclude this court from inquiring into the effect of the act of July 23, 1866, c. 219, "to quiet land titles in California;" and the court holds that that act does not require proof of an actual grant from the Mexican authorities to some grantee through whom the title set up is derived; but that the proper officers of the United States had jurisdiction to issue a patent upon being satisfied of the existence of those facts in regard to which it was their province to determine; and that the act includes those who, in good faith and for a valuable consideration, have purchased land from those who claimed and were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

The facts in this case do not show, as matter of law, that Millett could not have been a *bona fide* purchaser of these lands for a valuable consideration; and whether in fact he were so was a fact to be determined by the Government on the issue of the patent, which precluded further inquiry into that question.

A person who was within the statute and had the right to purchase land as provided therein, could assign or convey his right of purchase and his grantee could exercise that right.

The rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter were all acts within his jurisdiction.

THE defendant in error, who was the plaintiff below, brought this action in the Circuit Court of the United States for the Northern District of California to recover the possession of certain lands described in his complaint; and also the value of the rents, issues and profits thereof. He alleged that he was the owner in fee of the lands in question and entitled to their possession, and that while such owner the defendants wrongfully entered upon the lands and ousted him therefrom, and have since wrongfully withheld from him the possession thereof. He further alleged that he was the owner of the land by virtue of a patent duly and regularly issued to him by the United

States in the year 1893, under and in pursuance of the provisions of the act of Congress of April 24, 1820, c. 51, 3 Stat. 566, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, and also under the provisions of section 7 of the act of Congress of July 23, 1866, c. 219, entitled "An act to quiet land titles in California," and that the defendants denied the validity of that patent.

The defendants answered, denying the various allegations of the complaint, and the case came to trial without a jury, a jury having been waived by all the parties.

The plaintiff put in evidence the patent issued to him from the United States for the land described in the complaint, and proved that while he was in the peaceable and quiet possession of such land the defendants entered upon it and ousted him therefrom, and have ever since detained the land from him. He also proved its rental value.

The bill of exceptions contains the following:

"It was then admitted by the defendants' counsel that at the time of the issuance of the patent hereinbefore described the lands therein and in the complaint described were public lands of the United States, subject to sale under the laws of the United States. It was here conceded by defendants' counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein, or any part thereof, either by certificate of purchase, patent or anything of the kind.

"The plaintiff then rested."

The plaintiff's action rests primarily upon section 7 of the statute of the United States, entitled "An act to quiet land titles in California," approved July 23, 1866. 14 Stat. 218, 220. That section, so far as material, reads as follows:

"SEC. 7. *And be it further enacted*, That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and

have used, improved and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office, joint entries being admissible by coterminous proprietors to such an extent as will enable them to adjust their respective boundaries."

To maintain their defence, the defendants then offered in evidence the application made by the plaintiff to purchase the lands from the United States pursuant to the seventh section above quoted. The application and the accompanying papers were offered for the purpose of showing that there had, in fact, never been any grant from the Mexican government to the Romeros, through whom, as supposed Mexican grantees, the plaintiff below derived his claim, and by reason of which claim he had made application to the land office under the provisions of the seventh section of the above-mentioned act of Congress. The papers offered in evidence by defendants showed that while the country was under Mexican rule the Romeros had taken proceedings to obtain a grant of lands, which included the land in question, from the Mexican government, and that such proceedings had certainly gone as far as a final decree by the governor providing for the making of a grant asked for, but there was no record evidence of any actual grant ever having been made. The facts as to the documentary evidence in the case are fully set forth in the report of the case of *Romero* v. *United States*, 1 Wall. 721.

The evidence so offered by defendants was objected to on the part of the plaintiff as immaterial, incompetent and irrelevant for the purpose of affecting the validity of the patent under which the plaintiff claimed title to the lands in question. The court sustained the objection and the defendants duly excepted. Thereupon the defendants rested, and the court ordered judgment to be entered in favor of the plaintiff and

against the defendants for a recovery of the land in accordance with the prayer of the complaint. This judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, 44 U. S. App. 232, and the case is brought here for review.

Mr. Henry F. Crane for plaintiffs in error.

Mr. A. T. Britton and *Mr. A. B. Browne* for defendant in error.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

I. The defendant in error insists that his patent is conclusive evidence that he is a purchaser within the meaning of the seventh section of the statute above quoted, and that no fraud being alleged, no evidence can be received for the purpose of in any other way invalidating the patent issued to him by the Government of the United States.

The patent does not preclude this court from construing the act of 1866, nor does it preclude an inquiry by the court whether the patent was issued without authority or against the expressed will of Congress, as manifested in the statute. *Burfenning* v. *Chicago &c. Railway*, 163 U. S. 321, and cases there cited. If it were so issued, it is the duty of the court to give no weight to it. The proper construction of the act of 1866 is, therefore, the first question to be considered.

In order that a person may avail himself of that act, is it necessary that an actual grant from the Mexican authorities to some grantee through whom the title is derived should be proved? If so, the judgment in favor of the plaintiff in this case must be reversed, as no such grant was proved. We are of opinion, however, that the statute does not require proof of such a grant.

When the United States took possession of that portion of the country in which the lands in question are situated, it is public knowledge that there were many claims made by

private individuals to lands under alleged grants from the preceding Mexican government. In order to ascertain and settle the questions arising thereunder, Congress, on the 3d of March, 1851, passed an act, c. 41, 9 Stat. 631, in which a commission was constituted and before which claims of that character might be proved. The eighth section provided, "That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

It will be noticed that the jurisdiction here given was only to decide upon the validity of the claim presented, and if the commission decided that the claims were not valid ones, as derived from the Mexican or Spanish government, it was the duty of the commission to reject them. Provision was made for a review of the decision of the commissioners by the District Court of the district in which the lands claimed were situated, which court, upon such review, was authorized and required "to decide on the validity of such claim," and an appeal from the decision of the District Court was allowed to be taken to the Supreme Court of the United States.

It appeared, from the documents offered in evidence in this action, that the Romeros had presented their claim to this commission, which had rejected it as not being a valid claim, and this rejection had been affirmed by the District Court and by the Supreme Court in the case in the first of Wallace, mentioned above. There must undoubtedly have been, at the time of the enactment of the act of 1866, many cases existing

in that part of the country, where claims of *bona fide* purchasers for value founded upon supposed rights or grants derived from the Mexican or Spanish government had been held to be invalid by the commission appointed under the act of 1851, and where, notwithstanding such decision, the claimants had remained in possession of the lands as originally acquired by them, there being no valid adverse right or title to the lands of which they were in possession, excepting that of the United States. This would have been the natural result arising from the difficulty in making formal and sufficient proof before the commission of valid rights and titles derived from the Mexican or Spanish government. It was only valid claims that the commission had power to allow. Where claims had been made and theretofore adjudged invalid by the Supreme Court of the United States, Congress had, in some instances, by private act, permitted those who were *bona fide* purchasers from the claimant whose claim had been adjudged invalid, or from his assigns, to enter the land so purchased according to the lines of the public surveys then provided for, at $1.25 per acre, to the extent to which the lands had been reduced to possession at the time of the adjudication by the Supreme Court. Such is the act, approved March 3, 1863, c. 116, 12 Stat. 808, entitled "An act to grant the right of preëmption to certain purchasers of the 'Soscol Ranch' in the State of California." See also a similar act, approved June 17, 1864, c. 133, 13 Stat. 136; also the act approved July 2, 1864, c. 218, 13 Stat. 372; also the act approved March 3, 1865, c. 115, 13 Stat. 534.

Other acts were also passed by Congress recognizing in effect the equitable rights of parties who were grantees of those who had claimed a right or title under the Mexican or Spanish government, and which right or title had subsequently been held to be invalid by the courts of our own Government. The hardship to be relieved from by these special acts and by the general act of 1866 did not solely exist in the fact that there had been a formal grant from the Mexican authorities, which was in some manner defective, so that no valid claim or right could grow out of such grant, but it also existed when a claimant in possession of land which he

had *bona fide* and for a valuable consideration purchased of one who claimed his right or title from the Mexican or Spanish government by way of a grant therefrom, was nevertheless unable to prove such grant, and as a consequence could not prove any valid title or claim in himself. Whether such invalidity were on account of some defect in the proceeding which resulted in a defective grant or whether it existed by reason of an inability to prove an actual grant was not material, so long as the claim of title actually rested upon what was in good faith supposed to have been a valid claim under the government of Mexico, and so long as there was no valid adverse right or title other than that of the United States. Persons occupying lands which they possessed under such circumstances and by such a claim were entitled to considerate treatment from the Government of the United States. They had in good faith paid a valuable consideration for the land of which they were in possession by virtue of such purchase, and they ought to have the first right to make good their title by purchase from the Government at the lowest price named.

The defendants on the trial conceded these lands were, when the patent in this case was issued, public lands of the United States, subject to sale under the laws thereof, and that they did not intend to connect themselves in any manner or form with the title of the United States to the lands in question. There is no proof or offer of any proof in the record tending to show the existence of any adverse valid claim to the land, other than the United States, and the admission just alluded to taken in connection with the absence of such proof shows that when the patent issued there existed in fact no other adverse valid claim upon the land than that of the United States. Those who could not show actual grants from the Mexican government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation.

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bacon's Abridgment, Statutes 1, 5; Puffendorf book 5, chapter 12; Rutherford, pp. 422, 527; and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: '*Æquitas est correctio legis generaliter latæ qua parti deficit.*'" *Riggs* v. *Palmer*, 115 N. Y. 506, 510. Opinion by Earl, J.

Construing the act of Congress of 1866 under the circumstances above outlined, and in view of the general rules of construction already stated, we hold that the provisions of the seventh section of that act include such a case as this. The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. When the act, therefore, speaks of *bona fide* purchasers for a valuable consideration of lands from Mexican grantees or assigns, which grants have subsequently been rejected, we do not think that the words "grantees" and "grants" should have such a rigid and technical construction as to require the actual existence of a formal grant from the government of Mexico, but we are of opinion the act should be construed in accordance with what we conceive to have been its plain purpose, which was to cover the case of those persons who in good faith and for a valuable consideration have purchased lands (and taken and retained their possession) from those who claimed and were supposed to be Mexican grantees, but whose claims had been subsequently rejected. Otherwise, it seems to us clear that the purpose for which this

seventh section was passed would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for.

The circumstances existing at the time of the passage of this act necessarily lead to the belief that the purpose of its enactment was to remedy (by purchase of the land from the United States at the lowest rate) a defect in a title supposed to have been derived from the Mexican government, where the claimant had in good faith and for a valuable consideration purchased from one who claimed to be a Mexican grantee, or from his assigns, and where there was no adverse claim other than that of the United States. A remedial statute ought not to be so construed as to defeat in part the very purpose of its enactment. *United States* v. *Hodson*, 10 Wall. 395.

In the case now before us it appears there had been very strong parol evidence of the existence of an actual grant from the Mexican government, but it was not thought to be strong enough to overcome the absence of any record evidence of such a grant. We think that under the statute of 1866 record proof of the existence of a grant was not necessary in order to give the officers of the United States jurisdiction to issue the patent upon being satisfied of the existence of those facts in regard to which it was their province to determine. The act has received the same construction in the Supreme Court of California in the case of *Bascomb* v. *Davis*, 56 California, 152. The court there construed it so as to include those who in good faith and for a valuable consideration had purchased lands which were supposed to have been granted by the Mexican government, and who had used, improved and continued in the actual possession of the lands as provided in the act. This construction by the California court is entitled to very high consideration, and especially is this so in a case where the act was directed to a condition of things in existence at the time of its passage and with which the courts of that State would be particularly familiar.

In *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, this court construed an act of Congress which alluded to lands "granted as aforesaid" as including lands *purporting* to have

been "granted as aforesaid," and this inclusion was made because the court was satisfied, taking all things into consideration, that such construction was what Congress meant. The court simply carried out that intention by supplying a word not found in the act.

For the reasons thus given we think this act includes those persons who in good faith and for a valuable consideration have purchased land from those who claimed and who were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

II. Coming to the conclusion we have there is another objection made to the title on the part of the plaintiffs in error. They urge that the statute requires that the person who purchased the land should have made his purchase from the Mexican grantee or his assignee in good faith, and it is stated that as the defendant in error made his purchase from a remote grantee of the Romeros on the 15th of May, 1876, twenty years after the claim had been rejected by the commissioners appointed under the act of 1851, eighteen years after it had been rejected by the United States District Court, and thirteen years after it had been rejected by this court, it was clear as a legal result from these facts that he could not be a purchaser in good faith.

It appears however that on the 8th of August, 1859, one S. P. Millett became a grantee and entered into the possession of the lands, used, improved and cultivated them, and continued in the actual possession thereof according to the lines of the original purchase until 1868, and that the defendant in error claims through Millett by several mesne conveyances. Plaintiffs in error object that Millett was not a purchaser in good faith because he did not purchase until October, 1859, before which time the claim of the Romeros had been rejected by the commissioners and by the United States District Court. An appeal from those decisions was pending at the date above mentioned before this court, and it was therein contended that the Romeros had a valid claim under the Mexican government such as should have been recognized by the commissioners and by the District Court, and such as ought to be recognized by

the Supreme Court. We do not think the facts thus stated show, as matter of law, that Millett could not have been a *bona fide* purchaser of these lands for a valuable consideration, and whether in fact he were such *bona fide* purchaser was a question to be determined by the Government on issuing the patent, and an inquiry into that question of fact is precluded by the patent itself.

III. It is also objected that even if Millett were adjudged a purchaser in good faith from a Mexican grantee, he could not convey to another his right under the statute of 1866, but that it was a mere personal privilege which he might exercise to purchase the land at the minimum price established by law. We think that a person who was within the statute and who had the right to purchase land as provided therein was not confined to the actual purchase himself, but that he could assign or convey such right, and that his grantee or assignee, immediate or remote, could, so far as this point is concerned, exercise the same right of purchase which he had before he conveyed or assigned.

In *Thredgill* v. *Pintard*, 12 How. 24, the court recognized the right of an individual in possession of land and who was entitled to a preëmption right therein to convey such right to another.

In *Webster* v. *Luther*, 163 U. S. 331, it was held that persons entitled under the Revised Statutes, section 2304, to enter a homestead, who may have theretofore entered under the homestead laws a quantity of land less than 160 acres, and who had the right under section 2306 to make an additional entry for the deficiency, could transfer such right by a proper conveyance.

In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866.

Upon this question it must be assumed that Millett was a purchaser in good faith. Being such a purchaser he could

assign his right and title to another, and the rights under such assignment were not affected by the fact that the defendant in error did not purchase his title until many years after the final determination by this court that no formal, actual or valid grant had ever been made by the Mexican government to the Romeros.

IV. We are also of opinion that the rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter by the Secretary, were all acts within the jurisdiction of that officer. The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office. The Secretary who made the first decision herein, could have granted a rehearing and reversed his former ruling.

The case of *United States* v. *Stone*, 2 Wall. 525, has no bearing adverse to this proposition. In that case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does *Noble* v. *Union River Logging Railroad*, 147

U. S. 165, touch the case. The principle therein decided was in substance the same as in the *Stone case, supra.* The control of the department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted. See also *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, at 592.

We have considered the other questions raised herein but do not think any error was committed in their disposition by the courts below. The judgment of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE HARLAN dissented.

SMITH *v.* NAPHTALY. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. No. 181. Submitted with No. 180. MR. JUSTICE PECKHAM delivered the opinion of the court. In this case, counsel for the appellant concedes that if the court should hold that the sale of the land mentioned in the patent involved in the foregoing case were a valid sale, then the judgment in this case should be affirmed. As we do so hold, the judgment herein is, therefore,

Affirmed.

MR. JUSTICE HARLAN dissented.

Same counsel and same briefs as in No. 180.